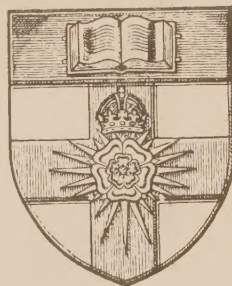


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CASES
 DETERMINED BY THE
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HIGH COURT OF JUSTICE
 AND BY THE
CHIEF JUDGE IN BANKRUPTCY
 AND BY THE
COURT OF APPEAL
 ON APPEAL FROM THE CHANCERY DIVISION AND THE
 CHIEF JUDGE
 AND IN
LUNACY.

In re ALISON'S TRUSTS AND *In re* JOHNSONS, INFANTS.

Infants—Guardianship and Maintenance—Court of County Palatine—Concurrent Jurisdiction.

C. A.

1878

Jan. 30.

In 1874, a petition was presented in the Court of the County Palatine of Lancaster for a guardian and maintenance to two infants, who were entitled for life to a very large property under their great-grandfather's will. Their mother and another person were appointed guardians, and an allowance for maintenance was fixed, and was afterwards varied from time to time by the Court. In 1877, the mother, as next friend of the infants, obtained in the High Court a judgment for administration of the testator's estate, and then took out a summons in the action for the appointment of guardians and an allowance for maintenance. This summons was not served on the other guardian, but he heard of it, and by the direction of the Vice-Chancellor of the County Palatine took out a summons for directions in the Palatine Court. On the summons being attended, the Vice-Chancellor expressed strong disapprobation of the conduct of the mother in taking out the summons in the High Court, took an undertaking, which she voluntarily offered, not to proceed further with the summons in the High Court, and made a reference to the Registrar as to revising the allowances for maintenance. Soon after-

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C. A.

1878

In re
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AND
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INFANTS.

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wards, the mother, as next friend of the infants, applied to the Vice-Chancellor of the County Palatine to discharge the undertaking and to stay proceedings in the Palatine Court. This application having been refused, the mother, as next friend of the infants, appealed:—

Held, that, although the High Court had full jurisdiction to appoint guardians and order maintenance, notwithstanding the previous orders made by the Palatine Court, such jurisdiction ought not to be exercised unless some special ground was shewn, inasmuch as it was better for the infants that their maintenance and education should remain under the direction of the Judge who had directed them for three years, and was fully acquainted with the case; and that the proceedings in the Palatine Court ought not to be stayed:

But *held*, that, as the Vice-Chancellor of the County Palatine had no jurisdiction to grant an injunction to restrain proceedings in the High Court, he ought not to have taken an undertaking to discontinue them, and the undertaking was accordingly discharged.

Statement.
—

RICHARD ALISON died in August, 1874, leaving a will by which he gave his residuary estate, amounting in value to considerably more than £400,000, upon trust as to one moiety for his great-grandson *Richard A. Johnson* for life, and then for his children, and as to the other moiety, upon trust for his great-granddaughter *Mary E. Johnson* for life, and then for her children. These great-grandchildren were the children of a deceased grandson, and were born respectively in 1863 and 1865. Their mother, *Lucy Johnson*, was living. *Mounsey*, *Doke*, and *Houghton*, were the trustees of the will.

Soon after the testator's death a petition was presented in the Court of the County Palatine of *Lancaster*, by the infants, their mother, and the trustees of the will, for a guardian and maintenance, upon which the usual reference was made. The Registrar made his report on the 16th of February, 1875, approving of the mother and Mr. *Houghton*, one of the trustees, as guardians, and allowing £4500 a year for maintenance. The Vice-Chancellor on the 29th of June, 1875, made an order which in the main confirmed the report, but as regards maintenance allowed only £1500 a year for the maintenance of each of the infants as from the 16th of February, 1875, and gave liberty to apply again after twelve months. In December, 1876, the matter came before the Vice-Chancellor again, and the mother proposed an allowance of £5000 a year for the two children. The Vice-Chancellor allowed £2000 a year for each from the 10th of August then last, and Mr. *Houghton* being

dead, the order gave directions for filling up the vacancy in the trusteeship and reconstituting the guardianship. On the 12th of March, 1877, the guardianship was reconstituted by the appointment of the mother and the Rev. *J. B. Cox* as guardians. The direction as to maintenance was continued, and a direction which had been given by the former order to the surviving trustees to take steps to fill up the vacancy in the trusteeship was also continued.

On the 9th of August, 1877, without any application to the Court of the County Palatine, an action, *Johnson v. Mounsey* [1877 A.145] was commenced in the Chancery Division of the High Court of Justice, in the name of the infants, by Mrs. *Johnson* as their next friend, for the administration of Mr. *Alison's* estate, and on the 27th of September the common decree was made, the Plaintiffs and Defendants appearing by the same solicitors. Shortly after this, a new solicitor was appointed for Mrs. *Johnson*, as next friend, the trustees continuing to appear by the same solicitors as before.

A summons in the suit was then taken out in the name of the infants, by Mrs. *Johnson* as their next friend, returnable on the 8th of December, 1877, asking that £4500, free of income tax, might be allowed for the education and maintenance of the infants as from the 6th of November, 1877; and that some proper person or persons might be appointed guardian or guardians of the persons and estates of the infant Plaintiffs. This summons it was proposed to serve on the Defendants alone, but by the direction of the Chief Clerk it was amended and served also upon Mr. *Cox*. Before it had been served upon him he became aware of the institution of the suit, and of the summons having been taken out, and applied to Vice-Chancellor *Little* for directions. His Honour directed a summons to be taken out by Mr. *Cox*, and to be served on the infants and on Mrs. *Johnson*, for directions in the matter. Upon the summons being attended on the 8th of December, His Honour expressed his opinion that the taking out the summons in the High Court was a very improper proceeding; and Mrs. *Johnson*, by her counsel, undertaking to proceed no further with that summons, a reference was made to the Registrar whether it was desirable that any alterations should be made in the allowances and the scheme for the education of the infants.

C. A.
1878
In re
ALISON'S
TRUSTS
AND
In re
JOHNSONS,
INFANTS.
Statement.

C. A.
 1878
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*In re*  
 ALISON'S  
 TRUSTS  
 AND  
*In re*  
 JOHNSONS,  
 INFANTS.  
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 Statement.

On the 22nd of December, 1877, the infants, by Mrs. *Johnson*, their next friend, moved before Vice-Chancellor *Little* that the summons heard on the 8th of December might be reheard, and that the undertaking then given by Mrs. *Johnson* might be cancelled, and that all further proceedings in the matter, except for taxation of costs, might be stayed; that the costs might be taxed, and that the parties might be at liberty to apply for their payment when taxed in the action of *Johnson v. Mounsey*. Vice-Chancellor *Little* refused the application.

The infants, by their mother as next friend, then gave notice of appeal, asking that the order of the 8th of December, 1877, might be discharged; that Mrs. *Johnson's* undertaking might be cancelled; that the several orders made by Vice-Chancellor *Little* in the matter might be discharged or suspended; and for the same directions as to stay of proceedings and payment of costs as were asked for before Vice-Chancellor *Little*.

Argument.

Horton Smith, Q.C., and *Oswald*, for the Appellant:—

The High Court is properly seised of the case, and the action there must be proceeded with: *Wynne v. Hughes* (1). The proceedings in the Palatine Court are insufficient for the protection of the infants, for if they were taken out of its jurisdiction they could do nothing. Then there is real estate out of its jurisdiction to be administered.

[JESSEL, M.R.:—Why can it not be administered in the Palatine Court? The Court acts *in personam*, and West Indian estates have often been sold by the Court of Chancery. I have no doubt of the jurisdiction of the High Court to appoint guardians though guardians have been appointed by the Palatine Court; the question is whether it is proper for it to do so.]

The High Court will give complete protection to its wards, and will not allow proceedings to be going on in another Court at the same time: *Johnstone v. Beattie* (2); *Stuart v. Marquis of Bute* (3). The father's wishes are attended to in the appointment of guardians: *Woolf v. Pemberton* (4); and when there is no father the wishes of the mother will be attended to.

(1) 26 Beav. 377, 382. *5 Jan 28/165*
 (2) 10 Cl. & F. 42.

(3) 9 H. L. C. 440. *7 Jan 28/165*

(4) 6 Ch. D. 19.

[JESSEL, M.R.:—I am not aware of any case in which that proposition has been laid down.]

There ought not to be double proceedings: *Wedderburn v. Wedderburn* (1). The High Court has the custody of the property, and if the Palatine Court has to make orders for maintenance, applications to the High Court will be necessary to give effect to them.

[JESSEL, M.R.:—Applications by unopposed summons, which may cost about 30s.]

Robinson, Q.C., and *Neville, contrà*, were called upon only on the question whether the undertaking by *Mrs. Johnson* ought to be treated as effectual.

JESSEL, M.R.:—

This is an application to discharge an order of the Vice-Chancellor of the County Palatine, Vice-Chancellor *Little*, and also to stay further proceedings before him. The matter is one of some importance as regards the jurisdiction of the Vice-Chancellor of the County Palatine, though it is of very little importance to the infants, their property being so large that a trifling amount of extra costs must be utterly immaterial to them.

The position of matters is this: The infants are entitled for life to a very large income under the will of their great-grandfather. They have no father, but they have a mother. They reside in the County Palatine, where, as I understand, their father resided. At all events, their great-grandfather resided there, and the bulk of the property is there. On the 16th of February, 1875, a report was made in the Court of the County Palatine, under a petition presented shortly before that time, as to the maintenance and education of the infants. That report was brought before Vice-Chancellor *Little*, and he settled the allowance for the maintenance of the infants, and approved of a scheme. In the month of December, 1876, that first allowance having been granted for twelve months only, the matter again came before Vice-Chancellor *Little*, when he altered the allowance, and he added a direction for the reconstitution of the guardianship. The next

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step was taken on the 12th of March, 1877, when the guardianship was reconstituted by an order of the Vice-Chancellor, and the mother, Mrs. *Johnson*, and the Rev. *James Bell Cox*, were appointed co-guardians, and they are the present guardians; and there was a further scheme for maintenance. In September, 1877, a suit was instituted in the High Court before the Vice-Chancellor *Malins* for the administration of the estate of the great-grandfather, and a judgment for administration was obtained. Then an application was made by summons, dated the 30th of November, 1877, before the Vice-Chancellor *Malins*, which is in substance an application for the appointment of guardians, and for a scheme for an allowance for maintenance, and as to the school to which the boy is to be sent. Then the matter was brought before the Vice-Chancellor *Little*, and it appears he took an undertaking from the mother not to prosecute that summons, which she had taken out as the next friend of the infants; and he refused an application which was made in the name of the infants on behalf of the mother to stay the proceedings in his Court. The refusal to stay proceedings in the Palatine Court, and the continuance of the proceedings there, form the subject-matter of this appeal. The summons, of course, has not yet been heard by the Vice-Chancellor *Malins*. There are, therefore, at the present moment, no other guardians than the guardians appointed by the Vice-Chancellor *Little*, and no other scheme for the maintenance of the infants than the scheme approved by him.

Now, the Appellants say that we ought to stay the proceedings before the Vice-Chancellor *Little*, and that it is for the benefit of the infants that such stay should be made. I am quite unable to accede to that view. In the first place, it is said that by reason of the pending suit before the Vice-Chancellor *Malins* he has full jurisdiction to appoint guardians and to make a scheme for maintenance, and that it would be exceedingly improper that there should be two schemes for maintenance ordered by two different Courts, and probably irreconcilable in their terms. With all that I entirely agree. But the proceeding which we are asked to stop is not the second but the first proceeding. The Vice-Chancellor *Little* has had the maintenance and education of these infants before him from the commencement of the year 1875; he has

interfered personally, and has, on one occasion, at least, overruled the decision of the Registrar. He therefore, in my opinion, is a far more competent Judge to decide what is proper to be done for the future than a Judge who hears of the infants for the first time in the year 1878. If, therefore, I were to choose to which tribunal this matter should be remitted for decision, having regard merely to the benefit of the infants, other things being equal, I should certainly select that of the Judge who is already well acquainted with the matter. But, then, it is said that it is the duty of the Vice-Chancellor *Malins*, having the infants as his wards by reason of the judgment in the administration action, to see that guardians are appointed. It would be his duty to do so if there were no guardians competent to act; and I can imagine a state of circumstances arising in which it might be the duty of the Judge of the High Court to interfere even in a case which had been previously attached to the Palatine Court. But that case is not raised, and there is no difficulty whatever in the guardians appointed by the Palatine Court continuing to act, or in the Vice-Chancellor of the Palatine Court settling what allowance should be made for the maintenance of the infants, or what scheme should be adopted as to their education. It has been suggested that if the funds were brought into Court, application to the Vice-Chancellor *Malins* for payment of the sum so awarded or allotted by the Vice-Chancellor *Little* would be necessary. That may be so, but such an application is a mere form, it being merely a ministerial act to order payment of an allowance which has been fixed by a Court of competent jurisdiction, the expense would only be a few shillings, and it might happen that the application would not be made more than once in two or three years. In the case of an estate of this magnitude, or, indeed, I may say, in the case of any other estate, the expense of such an application is not to be regarded compared with the advantage of continuing the jurisdiction of the Judge who has made himself acquainted with the facts and circumstances affecting the maintenance and education of the infants. That being so, I have no hesitation in saying that two proceedings for the appointment of guardians and for a scheme of maintenance ought not to go on, but that the proceeding which is to be preferred is that which was first in order of date. Therefore it ap-

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pears to me that if the summons had been allowed to go on before the Vice-Chancellor *Malins*, the only result would have been that he would have declined to interfere in accordance with what I may call the universal practice among the different branches of the old Court of Chancery, and which still obtains as between the Judges of the Chancery Division of the High Court, not to interfere with each other's orders as regards maintenance and education of infants.

What I have said disposes of the substance of this appeal, the object of which was, in fact, to place the Vice-Chancellor *Malins* in a position to review or alter what had been done by the Vice-Chancellor *Little*. But there is a subordinate part of it in which, I think, the Vice-Chancellor *Little* made a mistake. He took an undertaking from the lady not to proceed with the summons. Now I adopt that portion of his judgment which says that if he could not have made the order probably he ought not to have taken the undertaking. The way he puts that himself is this: "But if the view I took of the matter was right, as I still think it was, then the undertaking was right in itself, and it was given after communications between the lady, her solicitor, and her counsel, of which the Court knew nothing, and I think I ought not to discharge it. But I hope it will be conveyed to the Court of Appeal if the case goes there, that I would not have taken that undertaking from Mrs. *Johnson* if I had not thought that it was strictly in accordance with the true view of the case upon the question of jurisdiction and of her duty as one of two guardians appointed by this Court, and more than that, I would not leave her under that undertaking if I thought otherwise now. Therefore the lady will go to the Court of Appeal with that expression of my opinion, and she is free to ask that Court to consider what was the order proper to have been made by me at *Liverpool*, even in the absence of that undertaking." So that we treat this matter as an application to the Vice-Chancellor *Little* for an order to restrain the lady from proceeding with the summons.

Now I think that the Vice-Chancellor, for whom I have the greatest respect, did not sufficiently consider that he was, in fact, asked for an injunction to restrain an action in the High Court, and if this had been brought pointedly to his attention, I am quite

sure he never would have thought of doing anything equivalent to granting such an injunction. He certainly has no jurisdiction, so far as I am aware, to restrain actions in the High Court. I think he might have relied on the good sense of the Judge of the High Court before whom the application in the action was brought to deal with it rightly; but it is not for the Judge of an inferior Court to restrain proceedings in the High Court, and it could make no difference that the taking such a proceeding in the High Court was not a proper act. If the Vice-Chancellor *Little* considered that the guardian had misconducted herself, he might have jurisdiction to remove her, but he could have, in my opinion, no jurisdiction whatever to grant an injunction to restrain the action; and that being so, as he puts it himself, he ought not to have taken the undertaking. The undertaking, therefore, will be discharged; but, the substance of the appeal having gone against the Appellant, I think the costs should follow the event.

It will be quite understood, from what I have said, that our discharging the undertaking is not to be considered as giving any encouragement to Mrs. *Johnson* to proceed with the summons.

BAGGALLAY, L.J. :—

In this case Mrs. *Johnson*, the mother of the infants, three years ago applied, or joined in applying, to a Court of competent jurisdiction, for the appointment of guardians of her children and for a scheme for maintenance. Orders were made and from time to time varied, and so matters continued, the infants having guardians and being maintained down to the month of August, 1877, pursuant to the orders so from time to time made. In August, 1877, Mrs. *Johnson*, as next friend of her children, instituted a suit in the Chancery Division of the High Court of Justice for the administration of the estate of the testator. I have listened attentively to the arguments of counsel in this case for Mrs. *Johnson*, to ascertain, if I could, what were the reasons which led to the institution of that suit. I am bound to say that I have been unable to derive from their arguments any reason of necessity or any reason of convenience. From the nature of the arguments addressed to us, and from the fact that the decree in the suit was followed very shortly by an application for the appointment of guardians of the

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infants upon the footing of there being no existing guardians, and from the fact that that summons was not served on Mr. *Cox*, one of the guardians appointed by the Vice-Chancellor of the duchy, I cannot resist drawing the inference that the real cause of the institution of that action was that Mrs. *Johnson* was not satisfied with the scheme for guardianship, and the scheme for maintenance and education which had been adopted by the Vice-Chancellor of the duchy, and that she thought it possible to obtain, in the course of this action in the High Court of Justice, other orders more in accordance with her wishes.

In that state of the case she comes here and says: "In the interest of these children I call on the Court not to allow these double proceedings to go on, but to let me have my way and put an end to all the proceedings in the Palatine Court, that I may obtain in the High Court results more in accordance with my wishes." That is practically what it comes to.

Now, it appears to me impossible to say that what the Appellant asks is for the benefit of her children. The order asked for by the notice of appeal is to discharge all orders which have heretofore been made by the Palatine Court as regards the guardianship and maintenance of the children. Now, were that order to be made, there would no longer be any existing order as to guardianship or maintenance, the summons which has been taken out in the High Court might be opposed, and probably would be opposed, and, having regard to all the circumstances of the case, weeks or months might elapse before a definite decision was arrived at, and during the whole of that time the children would be left without any existing order for guardianship or maintenance.

I am far from saying that in the course of proceedings in the administration suit circumstances may not arise which may render it desirable that there should be a stay of further proceedings in the Palatine Court, but at present I can see nothing of the sort, and therefore it appears to me that this appeal should be dismissed, and dismissed with costs.

As regards the undertaking, I concur substantially in what has been said by the Master of the Rolls; but it appears from the judgment of Vice-Chancellor *Little* that this was an undertaking voluntarily offered, and not in any way suggested from the

bench as an undertaking to be given; there was an apology offered to the Court for the course which had been pursued in taking out the summons in the High Court, and a voluntary offer to stay all further proceedings on that summons, and although I do not think that the undertaking was one which could be enforced against Mrs. *Johnson*, I cannot help feeling a little surprised that after what took place on that occasion this application should be made.

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I am entirely of the same opinion, and for the reasons given by the other members of the Court.

Solicitors: *Crook & Smith; Chester & Co.*

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*Administration in Bankruptcy—Joint and Separate Estate—Ostensible Partner—Holding out—Partners—Reputed Ownership—Leave to appeal to House of Lords—Question of Fact.*

Feb. 7, 14.

On the dissolution of a partnership between *H.*, *C.*, and *P.*, notice was given to the creditors that the business would thenceforth be carried on by *P.* alone, under the firm of *P., Son, & Co.* After this the business was carried on under that firm, and a banking account was opened in that name. *P.*'s son constantly signed cheques upon that account in the name of the firm. He also accepted bills in the name of the firm, negotiated loans to the firm, and sometimes ordered goods in the name of the firm. The name *P.* alone appeared on the outside of the business premises. The business was continued for a year and a half, and then *P.* and his son were, on the petition of a creditor of the business, jointly adjudicated bankrupts, as having traded as partners. They did not resist the adjudication. *H.*, with whom, on the dissolution of the old partnership, *P.* had covenanted for the payment of £6105, part of the capital of *H.* in that partnership, applied to the Court to annul the adjudication. The Registrar refused the application, on the ground that, though no actual partnership had existed between the father and son, the son had been held out to the petitioning creditor as a partner, so as to entitle him to maintain the adjudication. This decision was not appealed from. *H.* then applied to the Court for a declaration that the assets of the business were separate estate of the father. Both father and son deposed that no actual partnership had subsisted between them, but that it was intended from the first that the son should be a partner if the business had

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turned out profitable. The petitioning creditor deposed that the son had been held out to him as a partner. Evidence tending in the same direction was given on behalf of another creditor. Eight other creditors (the whole number who had proved being eighty-two) deposed that they had always treated the son as being a partner, and constituting with the father the firm of *P., Son, & Co.* :—

*Held*, that the assets must be treated as joint estate of father and son.

The rule that the doctrine of reputed ownership does not apply as between a dormant and an ostensible partner, does not include a case where the real owner of property allows it to be employed in a business in which another person is a partner with himself. In such a case the property will, in the event of bankruptcy, be, by virtue of the doctrine of reputed ownership, treated as joint estate of the two: *Per James, L.J.*

*Reynolds v. Bowley* (1) distinguished.

*Ex parte Arbouin* (2), *In re Rowland & Crankshaw* (3), and *Ex parte Sheen* (4), explained.

Leave to appeal to the House of Lords refused, on the ground that the question in dispute was merely one of fact.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

For some years prior to and up to the 31st of August, 1875, *Alfred Hayman, G. W. C. Catford, and Thomas Pulsford*, carried on the business of drapers in partnership, under the firm of *Hayman, Pulsford, & Co.* The partnership was dissolved by mutual consent as from the 31st of August, 1875. A notice, dated the 15th of September, 1875, and signed by the three partners, was inserted in the *London Gazette* of the 17th of September, 1875, stating that the partnership “was dissolved as and from the 31st of August, 1875, by mutual consent. The said business will henceforth be carried on by the said *Thomas Pulsford* alone.” At the same time a circular letter, dated the 15th of September, 1875, and signed by *Hayman, Pulsford, & Co.*, was sent by post to every person from whom the firm had bought goods. This circular stated that the partnership “has been this day dissolved by mutual consent. The business will henceforth be carried on by *Thomas Pulsford*, under the style of *Pulsford, Son, & Co.*, to whose account all purchases made since the 31st of August should be transferred.” At the date of the dissolution, the sum of £13,706 was owing from the firm to *Hayman*, in respect of

(1) Law Rep. 2 Q. B. 474.

(2) De G. 359.

(3) Law Rep. 1 Ch. 421.

(4) 6 Ch. D. 235.

his capital, share of profits, and advances made by him to the firm ; and it was agreed between the three partners that the book debts then owing to the firm, which were estimated to be of the value of £7601, should be got in by *Hayman*, and retained by him for his own benefit in satisfaction, to the extent of £7601, of the £13,706, and that the payment of the balance of £6105 should be secured by the covenant of *Pulsford*. The book debts were accordingly assigned to *Hayman*, and *Pulsford* entered into a covenant with him for payment of the £6105.

After the dissolution the business was carried on in the name of *Pulsford, Son, & Co.* An account in that name was in October, 1875, opened with the *London and Westminster Bank*. *Tom Pulsford*, the son of *Thomas Pulsford*, was in the constant habit of signing, in the name of the firm, cheques drawn upon this account. He also constantly accepted, in the name of the firm, bills of exchange drawn upon them ; he negotiated loans to the firm, and sometimes ordered goods in the name of the firm. The name of *Pulsford*, however, alone appeared on the outside of the premises where the business was carried on. In February, 1877, the firm were unable to meet their engagements, and determined to file a liquidation petition. A petition was prepared on behalf of *Thomas Pulsford* alone, described as having traded under the firm of *Pulsford, Son, & Co.* Before it was filed some of the principal creditors were consulted, and it was suggested that although the father and son both repudiated the idea of any partnership having existed between them, yet *Tom Pulsford*, the son, might probably be held to have made himself liable as a partner in consequence of the way in which he had acted, and it was determined to file the petition in the name of both father and son, as joint traders, under the firm of *Pulsford, Son, & Co.* This was accordingly done, and on the 26th of March, 1877, the creditors resolved upon a liquidation by arrangement, and the resolution was afterwards registered. *Hayman*, being only a separate creditor of the father, who had no separate estate, if the assets of the business were not his separate estate, and having opposed the registration of the resolution, appealed from the order for it, and, on the ground that there was in fact no partnership between the father and the son, Mr. Registrar *Hazlitt*, acting as Chief Judge, on the 27th of

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April, 1877, ordered the registration to be cancelled. This decision was not appealed from; but immediately after it was given the father and son signed declarations of insolvency, upon which, on the 10th of May, 1877, a creditor named *Ravenscroft* presented a bankruptcy petition against them, alleging that they had traded as partners under the firm of *Pulsford, Son, & Co.* On the same day an adjudication of bankruptcy was made against them by their consent. *Hayman* then applied to the Court to annul the adjudication. On the 22nd of June, 1877, this application was dismissed by the Registrar, on the ground that though no actual partnership had subsisted between the father and son, yet the son had been held out as a partner to the petitioning creditor to such an extent as entitled him to maintain the adjudication. This decision was not appealed from.

*Hayman* then applied to the Court for an order declaring that all, or such portion as the Court should think proper, of the estate which appeared in the accounts of the bankrupts, or either of them, as joint estate, formed part of the separate estate of the father, and for a direction that the trustee should treat the same accordingly as separate estate of the father. The bankrupts' statement of affairs shewed that their joint debts amounted to £8686, and their joint assets to £7833. *Hayman* was the only separate creditor of the father, his debt being stated as £6147, and there was no separate estate. On the 4th of August, 1877, the application came on to be heard by Mr. Registrar *Pepys*, as Chief Judge, and it was then ordered that the hearing should be adjourned to the 16th of November, 1877, and that the trustee should retain £3500, part of the bankrupts' property, to answer *Hayman's* claim, and any costs which might be ordered to be paid to him, but without prejudice to any question. On the 14th of December, 1877, the application was heard by Mr. Registrar *Hazlitt*, as Chief Judge. Both father and son were examined, and denied that there had been any actual partnership between them. The father said that there was an understanding that the son should eventually become a partner, if the business turned out a profitable one, but that it did not do so, and the arrangement was never carried out, and that the son was only a clerk at an annual salary. The father, however, admitted that the son "took the



position of partner;" that he had full authority to draw (as a clerk however) what cheques he pleased for the firm, to negotiate loans on his own responsibility for the firm, and to accept bills for the firm. The son admitted that he acted exactly as he would have done if a deed of partnership had been executed between himself and his father; that he signed in the name of the firm a large number of cheques; that he accepted bills and negotiated loans for the firm on his own authority, and that he sometimes, though rarely, bought goods on his own authority for the firm. He never sold any of the stock.

*Ravenscroft*, the petitioning creditor, who was a lace merchant, deposed that in July, 1876, his traveller sold goods to the amount of £47 13s. 7d., and the order was returned to him under the name of *Pulsford & Son*, and the traveller told him that the bankrupts were carrying on business in partnership. Other goods were sold to them by *Ravenscroft* in August, September, and October, 1876, to the amount of £92 5s., and in December he drew a bill upon them under the style of *Pulsford, Son, & Co.* for £92 5s., and the bill was accepted by them under that style. The bill was afterwards dishonoured and gave rise to the debt upon which the petition was founded. *Ravenscroft* said that he sold the goods for which the bill was drawn to the bankrupts as partners, and believed them to be partners at the time of the sale.

*Ravenscroft's* traveller deposed that when he sold the goods in July for £47 13s. 7d. the father, the son, and a female assistant in the business were present. He asked in whose name the account should be properly invoiced, and was told (though he could not say whether by either of the bankrupts or by the assistant) that the proper mode of invoicing the goods was *Pulsford & Son*, and he accordingly so entered this sale and subsequent sales in *Ravenscroft's* books. He said that he sold the goods in July and subsequently to the bankrupts as partners, and believed them to be partners, and added, "I saw that the son's name was used in the business as a partner, and he appeared to me to occupy that position."

A Mr. *Hogard*, who was the principal clerk to Messrs. *Candy & Co.*, the largest trade creditors of the bankrupts, and to whom they owed £1687 for goods supplied between July, 1876, and

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February, 1877, deposed that all the goods so supplied were invoiced in the name of *Pulsford, Son, & Co.*; that the account between *Candy & Co.* and the bankrupts was first opened in October, 1875, in *Candy & Co.*'s books under the heading of *Pulsford, Son, & Co.*, and that it was the practice of the bankrupts to make payments to *Candy & Co.*, partly by acceptances and partly by cheques, which were usually drawn in the name of *Pulsford, Son, & Co.*

A Mr. *Wright*, who was the traveller of *Candy & Co.*, through whom their business transactions with the bankrupts were usually conducted, deposed that in September, 1875, *Pulsford*, the father, told him that his son was about to join him in the business, and that he afterwards noticed that the business was carried on under the style of *Pulsford, Son, & Co.* He added: "I frequently called at the place of business to sell goods. *Tom Pulsford* appeared to act as one of the members of the firm, and I always treated him as a partner therein, as I believed he was. In the autumn of 1876 *Thomas Pulsford* told me that his son *Tom* had recently married a lady of means, and referred to that circumstance as a reason for increasing his credit with Messrs. *Candy*. I repeated the effect of this conversation to Messrs. *Candy*, and the bankrupts' credit was accordingly increased."

One of the members of the firm of *Candy & Co.* deposed that his firm treated the two bankrupts as being partners, and as constituting the firm of *Pulsford, Son, & Co.*, and gave credit to them accordingly. He said also that *Wright* had told him of his conversation with *Thomas Pulsford* about the marriage of his son, and added that, on the representation that the son had recently married a lady of means, he gave instructions that the account of *Pulsford, Son, & Co.* might be increased.

Eight other trade creditors (the whole number who had proved in the bankruptcy being eighty-two) deposed that they had dealt with the bankrupts as *Pulsford, Son, & Co.*; that goods were invoiced to them under that name; and that the goods were paid for by cheques and acceptances signed in that name. Each of these eight creditors said that he had always treated the son, *Tom Pulsford*, as being in partnership with his father, and constituting with him the firm of *Pulsford, Son, & Co.*

The Registrar refused the application. *Hayman* appealed.

Roxburgh, Q.C., *Horton Smith*, Q.C., and *T. L. Wilkinson*, for the Appellant :—

As the Registrar's order for the cancellation of the registration of the liquidation resolutions has not been appealed from, it must be taken, as against the other side, that the father and son were not partners *inter se*. On the other hand, as the Registrar's refusal to annul the adjudication has not been appealed from, we cannot dispute that there was a holding out of the son as a partner to the individual petitioning creditor sufficient to enable that creditor to have maintained an action against the son as an ostensible partner, and therefore sufficient to entitle that creditor to the adjudication which has accordingly been made. But such a holding out to one or two isolated creditors does not convert assets, which were originally separate estate of the father, into joint estate of father and son. In order to bring about such a change, one or other of two conditions must be fulfilled: there must be either a general representation to creditors of a joint trading, or a general representation to creditors of the existence of a joint estate: *Ex parte Sheen* (1). The evidence shews no such representation of either sort. The only holding out of the son as a partner which is proved, is in the case of the petitioning creditor. In the case of Messrs. *Candy & Co.* there is merely an attempt to prove the like; while in the cases of the only other eight out of the whole body of eighty-two creditors who have made affidavits there is not even such an attempt, and the rest are absolutely silent. The use of the word "son" in the style of the firm implies nothing; it is well known that the name of a firm is no indication of the names of the actual partners.

[JAMES, L.J.:—If I go to a shop and find the names *Thompson & Jones* on the door, and I go in and find *Thompson* and *Jones* selling goods, am I not warranted in believing that they are partners?]

That would not amount to a representation which could change the nature of the assets. Moreover the evidence here is that the

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son never sold any of the stock. On the dissolution of the old firm, all the creditors were told that the business would be continued by the father alone under the new style.

[JAMES, L.J.:—The then creditors were told so. Those who became creditors since saw the name of the firm and trusted it.]

They ought to have inquired of whom the firm consisted.

The other side in the Court below, however, based their argument more upon the second requisite for the conversion of the assets into joint estate, calling in aid the doctrine of reputed ownership, and relying upon *Ex parte Arbouin* (1) and the remarks of Lord Selborne in *Ex parte Watkins* (2). But reputed ownership can have no relation to a case like the present. *Pulsford & Son* could not have been the reputed owners of the property of *Pulsford*. To constitute reputed ownership one essential element is the existence of an actual owner as opposed to and distinct from a reputed owner: *Load v. Green* (3); *Belcher v. Bellamy* (4). The doctrine is excluded by a joint possession: *Reynolds v. Bowley* (5); *Lindley on Partnership* (6); and has no application to the case of partners: *Ex parte Hare* (7); *Ex parte Cooper* (8).

[*De Gex*, Q.C.:—*Ex parte Hare* is differently reported in *Deacon's Reports* (9).]

It is, but the *dictum* there attributed to Sir John Cross is at variance as well with his own previous remark during the argument (10) as with his judgment in *Ex parte Cooper*. In *Ex parte Arbouin* it is true that the Commissioner came to the conclusion, which was there under review, on the ground of the applicability of the doctrine of reputed ownership, and the Chief Judge expressed himself as agreeing with the Commissioner; but the report does not say, and in the face of the authorities just referred to it cannot be assumed, that his argument was based upon the same grounds. The real ground of the decision of the Chief Judge in *Ex parte Arbouin* must have been, at any rate the only ground upon which it can be supported is, that by the circular issued to his customers by *John Reay*, the owner of the property in question, he had

(1) De G. 359, 369.

(2) Law Rep. 8 Ch. 520, 528, 529.

(3) 15 M. & W. 216, 223.

(4) 2 Ex. 303, 309.

(5) Law Rep. 2 Q. B. 474.

(6) 3rd Ed. vol. ii. p. 1200.

(7) 2 Mont. & A. 478.

(8) 1 M. D. & D. 358, 363.

(9) 1 Deac. 16, 25.

(10) Ibid. 21.

devoted it to the joint dealings of himself and his nephew, and converted it from being his own property into the joint property of the two; in other words, that there had been a general representation to creditors of the existence of a joint estate. In accordance with this view of the Chief Judge's ruling in that case is the interlocutory remark of the Lord Justice *James* in *Ex parte Sheen* (1), as also the scope of the argument and of the judgment in *In re Rowland & Crankshaw* (2). This same principle of a general representation to creditors of the existence of a joint estate will be found, when they are carefully considered, to lie at the root of each of the other cases relied upon against us below, viz.: *Ex parte Hunter* (3), *Ex parte Murton* (4), *Ex parte Owen* (5), and *In re Rowland & Crankshaw*. In this last case—perhaps the strongest against us—the two adventurers started *ab initio*: they acquired property, each taking part in its purchase; and such property so acquired was necessarily joint estate. The inference from what Lord *Cranworth*, who treated them as actual partners, which they were not, said in his judgment is, that there had been a general holding out to creditors of the existence of a joint estate. There is nothing like that in the present case.

This appeal ought, therefore, to be allowed to its full extent. At any rate, some of the stock-in-trade can be identified as having been in existence when the Appellant retired from the old firm, and the subsequent creditors cannot be entitled to that, or to any book debts representing it, as joint estate of the father and son. The order under appeal works great hardship upon the Appellant, while to allow the appeal will work full justice to all parties, as the joint creditors and the Appellant will then share alike in the distribution of the assets.

De Gex, Q.C., and *Macnaghten*, for the trustee, were not heard.

JAMES, L.J.:—

I am of opinion that it is really impossible to distinguish this case in any material circumstance from *In re Rowland & Crank-*

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(1) 6 Ch. D. 235, 237.

(2) Law Rep. 1 Ch. 421.

(3) 2 Rose, 382.

(4) 1 M. D. & D. 252.

(5) 4 De G. & Sm. 351.

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shaw (1), a case which I think does not stand alone. However, it is a decision of a Court of equal jurisdiction with ourselves. The Lord Chancellor was then sitting in appeal in bankruptcy, as we are now. There the facts were these:—A trader, named *Crankshaw*, who owned all the property of a business, employed another man named *Rowland* as his manager, there being an understanding or an intention that he should at some future time be taken in as a partner. Then *Rowland* bought goods, apparently in the names of the two, so as to create an apparent possession of the two. Under those circumstances, although it was contended very strongly before Lord *Cranworth*, that the assets of the business never were anything but separate estate of *Crankshaw*, that if there had been no bankruptcy *Rowland* could have claimed no part of the property, and that his assignees in bankruptcy could take nothing except what belonged to him, it was held that there was no doubt that they had both held themselves out to be partners, and were both liable to the creditors. It was held that the assets of the business were joint estate. In that state of things, there being nothing but an ostensible partnership, Lord *Cranworth* said this: “When two partners are bankrupts, all the property must go in payment of all the creditors. In the administration of bankruptcy it has been the object from the earliest times to apportion the assets as fairly as possible between the joint and separate creditors. There is often much difficulty in doing this satisfactorily”—I quite agree with that—“but some rules have been clearly laid down, for instance, that the joint property pays the joint creditors, and the separate property pays the separate creditors. Now what is said here is, that this estate, though said to be joint, is in fact separate. These two gentlemen traded under the name of *Rowland & Co.*, and tradesmen supplied them with large quantities of goods, and then they became bankrupts, and it is now said that they were not partners, and that the real agreement between them was that everything belonged to *Crankshaw*. That is no reason, and as *Crankshaw* suffered *Rowland* to trade in the name of the firm, any persons trading with him are entitled to say that *Rowland & Crankshaw* are the persons with whom they dealt and that the goods are joint goods.”

Every word of that judgment applies to this case, with this single exception (which, however, is in favour of the decision of the Registrar), that, instead of the words used being "and Co.," which is an ambiguous term, and might mean anybody in the world, here the words are "*Pulsford, Son, & Co.*," and they are introduced for the first time on the retirement of the old partners, and are therefore, not the continuation of an old firm, but the creation of a new one. Then the evidence seems much stronger in the present case, as to the extent of the knowledge of the creditors, than it was in *In re Rowland & Crankshaw* (1). In the statement of that case I find this: "It appeared, from the examination of some of the creditors, that *Rowland* managed the business and made nearly all the purchases, but that some purchases had been made by *Crankshaw*, and several creditors deposed to their having given credit to the bankrupts as partners. The whole of the capital was furnished by *Crankshaw*." I wish to note these words particularly—"Several creditors deposed to their having given credit to the bankrupts as partners." That is exactly what we have in this case. We have the fact that the son was introduced into the firm by the name of "Son," and there was no other person who could have been described as answering to that description, except the son who has been made a bankrupt, and several of the creditors have deposed to the fact that they gave credit to the bankrupts as partners. Both father and son acted as having an equal right to use the partnership name. Cheques were drawn by the son as principal in the name of the firm; bills of exchange were accepted by him in the name of the firm; goods were ordered by him; and loans, when required, were negotiated by him in the name of the firm. Therefore it is impossible to say that this case is not even stronger than *In re Rowland & Crankshaw*. It is not necessary to decide the point, but I am not at all satisfied, upon the evidence of the bankrupts, that there was not a real partnership between them. The partnership deed was not signed, because they were waiting to see whether there were any profits, but, if profits had arisen, the son would have taken a share of them from the very first.

But it is said that this conclusion will work a hardship to the

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Appellant, who is a creditor of the father alone, and who sold his share of the old business partly for a sum of money due from the father alone. I think that is only one of those misfortunes which occur to persons who deal with others who afterwards become bankrupt, and who become bankrupt having partners. The hardship would have been exactly the same upon Mr. *Hayman* if there had been a real partnership created by a formal instrument. The same consequences would then have happened as happen where there is only an ostensible partnership. The rule has been established that joint creditors take the joint estate, and separate creditors take the separate estate, and you have only to consider what is joint and what is separate estate, and you must apply the rule independently of the hardship or supposed hardship which it may inflict in any particular case. In fact, in every bankruptcy there is, in one point of view, the greatest possible hardship inflicted upon the last creditor, who just upon the eve of bankruptcy supplies the bankrupt with the goods which, in many instances, constitute the entire assets available for distribution among the creditors, and yet the person who supplies those goods only comes in for his share with the other creditors whose goods were sold to the bankrupt long before. But we cannot look at the hardship inflicted upon any particular person, or at the nature of any particular transaction. We can only apply the fixed rule, that that which is joint estate shall go to the joint creditors, and that which is separate estate shall go to the separate creditors. And what is joint estate and what is separate estate is also affected by the doctrine of reputed ownership. It is said that that doctrine does not apply to a case of this kind. I am of opinion, however, that that doctrine was really the foundation of Lord *Cranworth's* judgment in *In re Rowland & Crankshaw* (1).

I wish to make this further observation upon the case of *Reynolds v. Bowley* (2), which was decided in the Exchequer Chamber. Beyond all doubt where property belongs to a partnership of two, and there is only one ostensible partner, you cannot apply the doctrine of reputed ownership. The property is that of the two, and you cannot say that, because there is only one ostensible partner, the Court will, in the event of bankruptcy, treat the

(1) Law Rep. 1 Ch. 421.

(2) Law Rep. 2 Q. B. 474.

property of the firm as in his order and disposition. The possession in such a case is quite consistent with the real title, and therefore the reputed ownership clause does not apply. But that has really nothing to do with a case where one man, who is the real owner, forms a partnership consisting of two or three persons, and allows them to have the apparent possession and ownership of the property. There, the real owner being one person, some other persons, who are not the real owners, have acquired by his consent the reputed ownership and the apparent possession, and it can make no difference that he himself is one of the firm who have the apparent possession. *Ex parte Arbouin* (1) was determined on reputed ownership, and that principle seems to me to underlie the decision in *In re Rowland & Crankshaw* (2). The ostensible partner received the goods, and the persons who dealt with the firm had a right to hold them to that which was represented by their common consent to be the fact. The doctrine of reputed ownership is only an application of the common principle that people must make good their representations; they must make good that which they hold out to the world as being the fact. That some of the creditors may be disappointed is beside the question, for a creditor has no equity except through his debtor. He has certainly no right to any particular assets, nor, indeed, has he any right with regard to the assets, except a right to have them dealt with according to the rights of the debtor in them. In *Ex parte Sheen* (3) I was endeavouring to apply the principle of *In re Rowland & Crankshaw*, when I said that it would not do to shew that some one creditor, or two or three creditors, might have received information that a man was liable as a partner, but that it must be shewn that there had been an ostensible partnership held out to the world. In my opinion there was such an ostensible partnership in this case; there was as complete a holding out to the world of the son as a partner, as, according to my view of the facts, can possibly be conceived.

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BAGGALLAY, L.J.:—

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I am of the same opinion. The question involved in this appeal

(1) De G. 359, 369.

(2) Law Rep. 1 Ch. 421.

(3) 6 Ch. D. 235, 237.

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is not whether, had there been no adjudication, every creditor of the firm of *Pulsford, Son, & Co.* could, upon the evidence before us, have maintained an action against the son upon the footing of his being a partner with his father, but whether, having regard to the circumstances in evidence before us, and there being an undisputed adjudication against both father and son, as joint traders under the firm of *Pulsford, Son, & Co.*, certain property, comprising in substance the whole of the assets of the firm, is to be treated as the joint property of the firm, or as the separate property of the father.

It appears to me that this case cannot be distinguished in principle from *In re Rowland & Crankshaw* (1). It is unnecessary for me to point out in detail the circumstances of similarity between the two cases; the Lord Justice has already done this. I only make this further observation, that it appears to me that, whatever distinction there may be between the circumstances of the two cases, the present case is a stronger one for applying the principle involved in the judgment of Lord *Cranworth*.

But, then, much reliance has been placed upon *Ex parte Sheen* (2), which was before this Court not very long ago, and it is contended that the present case comes within the principle upon which that case was decided. But in that case there was no holding out of *Crabtree* as a partner; no use of his name in the firm. All that seems to have been done by *Crabtree* was that a representation was made by *Wright* in his presence, in which, by his silence, he acquiesced, to the effect that he was a partner. There was no further holding out. If those representations were made by *Wright* in the presence of *Crabtree*, and he was silent, there might have been a liability on his part to those three creditors who became such on the faith of that representation. But there was no ground for applying the general principle involved in the case before Lord *Cranworth*. I am of opinion that the decision of the Registrar in the present case was right.

Thesiger, L.J.

THESIGER, L.J. :—

I am of the same opinion, and I only wish to add a few words. I rest my judgment entirely upon the principles of the decisions

(1) Law Rep. 1 Ch. 421.

(2) 6 Ch. D. 235.

in *In re Rowland & Crankshaw* (1) and *Ex parte Sheen* (2). But for the authority of those cases, I should have wished to hear further argument as to the consequences arising from an ostensible partnership, in the event of a bankruptcy, where there are both joint and separate creditors. If the consequence that the stock-in-trade is to be held to be joint property, where there is an ostensible partnership, is merely an offshoot of the doctrine of reputed ownership, then I can well understand that in such a case the rights of the separate creditors should be barred, and that they should not be entitled to prove in competition with the joint creditors. But, if this result is supposed to flow from the doctrine of ostensible partnership *per se*, then I must say for myself that I cannot see why in such a case the rights of the separate creditors should be any less than the rights of the joint creditors. The law relating to ostensible partnership is founded upon the doctrine of estoppel, and although the doctrine of estoppel might be perfectly good as between those who contract with the joint creditors and the joint creditors themselves, I do not see why in the event of bankruptcy that estoppel should apply to the separate creditors, whose rights before bankruptcy stand very much in the same position as those of the joint creditors. On the one hand you have a separate creditor, who had, before the bankruptcy, a right of action against his particular debtor, and a right, upon obtaining judgment in that action, to seize the property, which was in fact separate estate. On the other hand you have joint creditors, who are entitled to sue the two partners on the ground of the ostensible partnership, and who, in the event of their obtaining a judgment, would be entitled to seize the same property although separate estate. But, when bankruptcy arises, and there is to be an administration of the estate, it would seem to be just that the separate creditors should have a right against the estate which was in fact separate estate, and the joint creditors should have a right against the estate which was held out to them as joint estate. I do not see how, upon any doctrine of ostensible partnership founded on estoppel, there can be a greater right in the one case than in the other. But, if the difference is founded on the doctrine of reputed ownership, then it seems to me consistent with all the

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(1) Law Rep. 1 Ch. 421.

(2) 6 Ch. D. 235.

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 petition with the joint creditors.

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JAMES, L.J. :—

The appeal will be dismissed with costs.

Roxburgh, Q.C., asked for leave to appeal to the House of Lords.

De Gex, Q.C., opposed.

Feb. 14. JAMES, L.J. :—

4 CLD 747 We have considered the application, and have come to the conclusion that the matter in dispute is a mere question of fact, and is not a question of law. We, therefore, refuse to give leave to appeal.

Solicitors for Appellant: *Greig & Meikle*.

Solicitors for Trustee: *Rooks & Co*.

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LAW v. GARRETT.

[1877 L. 181.]

Partnership—Agreement to refer Disputes to Foreign Tribunal—Dissolution—Stay of Proceedings—Receiver—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 11.

The Plaintiff and three other persons, *G.*, *N.*, and *F.*, all British subjects, entered into an agreement, in the Russian language and registered in *Russia*, to trade in co-partnership in *Russia*, providing (*inter alia*) that the head office of the firm should be in *St. Petersburg*: and reserving to *G.* and *N.* the right to recall their capital within a year, and, if not paid within a month, the firm was to be wound up; and also providing that "all disputes, no matter how or where they shall arise, shall be referred to the *St. Petersburg* Commercial Court," whose decision shall be final. The Plaintiff alleged that there was a contemporaneous English agreement, not registered in *Russia*, by which *G.* and *N.* agreed to compensate the Plaintiff in the event of a dissolution within a year, under the powers reserved to them. The two partners exercised their right within the year to recall their capital, and immediately took steps to wind up the partnership in *Russia*. The Plaintiff having thereupon commenced an action in *England*, alleging that the pro-

ceedings of his co-partners, the Defendants, were taken without his knowledge and sanction, and were invalid and not binding on him, and claiming a dissolution of the partnership, relief in respect of the English agreement, the appointment of a receiver and other relief, the Defendants moved for a stay of proceedings in the action and a reference to the *St. Petersburg Commercial Court* :—

Held, that an agreement to refer all disputes to a foreign Court is within the 11th section of the *Common Law Procedure Act*, 1854, and that the Defendants were entitled to an order on their motion; and that, although the Court had jurisdiction to appoint a receiver pending a reference to arbitration, it was not proper to do so unless a special case was made, as the course of liquidation before the tribunal chosen by the parties themselves would thereby be interfered with.

Semble, if a sufficient case were shewn for granting an injunction the Court would not stay proceedings.

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In July, 1876, arrangements were made between the Plaintiff and the Defendants *Garrett, New, and Froom* (all British subjects, the first two of whom were resident in *England*), for re-establishing and carrying on in co-partnership in *Russia* the business of *H. B. Froom & Co.*, then recently in liquidation in *St. Petersburg*, and which had been transferred to the Defendants *Garrett* and *New* by the liquidator. A partnership deed dated the 3rd of August, 1876, was executed, which was in the Russian language and was executed and registered in *Russia*, and which provided (amongst other things) that the chief offices of the firm should be at *St. Petersburg*; that the capital of the company should be 300,000 silver roubles, of which sum there should belong to *Froom* and *Law* 25,000 roubles each, and to *Garrett* and *New* 125,000 roubles each; and that the books of the firm both in *England* and *Russia* should be balanced on the 31st of March in each year. By the 11th article it was provided that during the first year *Garrett* and *New* should be entitled to demand back their capital, and that if their demand was not satisfied within one month's time, then without delay the firm should proceed to liquidation; article 17 provided that "in case of any disputes arising between the parties to this agreement, or their executors, such disputes, no matter how or where they may arise, shall be referred to the *St. Petersburg Commercial Court*, or to any Court which may have taken its place—the decision of such Court shall be final."

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Differences having arisen, *Garrett and New*, on the 21st of June, 1877, served *Law and Froom* with a written notice demanding the repayment of their capital. The notice was accepted, but the money was not paid. Thereupon *Garrett and New*, in conjunction with *Froom*, executed certain protocols, being (as they alleged) the only necessary steps according to Russian law for winding up their partnership in *St. Petersburg*, and thereby appointed *Froom* receiver and liquidator in the winding-up, directing him to remit any surplus assets to *England* to nominees of *Garrett and New*. It did not appear that the Russian tribunal had taken any action in the matter, or that any application had been made to it.

On the 11th of August, *Law* commenced an action in *England* against his co-partners, alleging that the partnership arrangement was contained not in one but in three documents, all executed in *England*, but one of which, in order to conform to Russian law, was translated into Russian and executed and registered in *Russia*. He further alleged that by one of the English documents it was provided that if *Garrett and New* exercised their power of dissolving the partnership within the first year, he was to have the *Moscow* branch of the business made over to him, together with goods from that branch of the estimated value of £3000; that the proceedings for winding up instituted by the Defendants were taken without his knowledge and consent, and were not in accordance with Russian law and not binding on him, and he claimed a dissolution of the partnership, a declaration that he was entitled to the £3000 and other rights, for the appointment of a receiver, and other relief.

The Plaintiff then moved for the appointment of a receiver, and was met by a cross motion by the Defendants for a stay of proceedings and a reference of all matters in dispute to the *St. Petersburg* Commercial Court. Both motions came on together before Vice-Chancellor *Bacon*. It was deposed to by the Defendants that the assets were in *Russia*, although there were English creditors.

The motion was heard before Vice-Chancellor *Bacon* on the 22nd of November, 1877.

Sir *H. Jackson*, Q.C. and *J. Armstrong*, for the Defendants:—

The mere non-existence of the usual technical words of an arbitration clause is no objection to our motion. The word “arbitration” in the 11th section of the *Common Law Procedure Act* is not to be taken in its strict legal sense, but means any domestic legal forum that the parties shall agree upon. In *In re Durham County Permanent Benefit Building Society* (1), the matter in dispute was agreed to be referred to your Lordship as the Judge in the matter of the winding-up. We contend, therefore, that in each case the intention of the parties is to be considered, and that whenever there is a contract that “all disputes shall be referred,” that, within the spirit and meaning of the act, is “an agreement to refer to arbitration,” and entitles the parties to it to oust the jurisdiction of this Court, and to go before the special tribunal they have selected: *Willesford v. Watson* (2); *Plews v. Baker* (3); *Gillett v. Thornton* (4). In this case, for all purposes of jurisdiction, the place of arbitration is the Commercial Court at *St. Petersburg*.

As to a receiver, his appointment would cause a conflict between English and Russian law; and, even if this Court has jurisdiction to appoint a receiver pending this reference, no wasting of assets is alleged, and no case suggested which necessitates his appointment.

Hemming, Q.C., and *Crossley*, for the Plaintiff, and in support of the motion for a receiver:—

[BACON, V.C.:—The pressing matter before the Court is whether a receiver should be appointed.]

As to a receiver: we say that the assets are not safe, and that the Court will not, after a dissolution, allow three partners to oust the fourth partner from all participation in the winding-up of the partnership, and to place the assets in the hands of a party whom they select without the knowledge and consent of the fourth partner, but will place them in safety until the question in dispute between the partners has been settled; especially when, under a

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(1) Law Rep. 7 Ch. 45.

(2) Ibid. 8 Ch. 473.

(3) Law Rep. 16 Eq. 564.

(4) Ibid. 19 Eq. 599.

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certain document, which the Defendants treat as a nullity, we claim a large share of the assets.

As to the Defendants' motion: we claim to have this partnership wound up on the footing of three documents. The Defendants rely on one document, and the arbitration clause which it contains. But we say that that clause refers only to disputes arising between the partners in carrying on the business, and cannot be extended to circumstances arising after an agreed dissolution has taken place, nor can it apply to disputes arising on other documents which the Defendants themselves assert do not form part of the partnership arrangement. But if it does apply, the Court, in the exercise of its discretion under the 11th section of the Act, will not stay proceedings in a case where, as here, the material question is whether a receiver should be appointed; and if it does stay proceedings, it will at any rate appoint a receiver to protect the assets pending the reference to arbitration.

Judgment,
 V.-C. B.

BACON, V.C. :—

In this case there are two matters to be considered. The first is whether the proceedings instituted by the Plaintiff in August, 1877, should be stayed or not. Now, the ground suggested for that is that the Plaintiff being a partner with the Defendants, the partnership was constituted, as the Plaintiff says, by three agreements, but, according to the Defendants, in one document, and that one providing, "in case of any disputes arising between the parties to the agreement, or their executors, such disputes, no matter how or where they may arise, shall be referred to the *St. Petersburg* Commercial Court, or to any Court which may have taken its place, and the decision of such Court shall be final." That there are disputes between these parties is unquestionable, which is all that has to be ascertained, and, if it be so, they by their contract, the contract, which is confirmed by the principle and operation of the *Common Law Procedure Act* and by the cases which have been referred to, have entered into a binding agreement that, whatever may be their disputes, "how or where they may arise"—I do not say it does or does not mean whether in *Russia* or *England*, but the words are wide enough to comprehend that—they may or may not—they shall be referred to that tribunal.

Now the further facts to be considered are, that, under the terms of the partnership deed there being a power in the Defendants to put an end to the partnership, the statement of claim sets out a notice by which the Defendants *New* and *Garrett*, having determined to dissolve the partnership, determined it on the 21st of June, 1877, and "the Plaintiff accepts such notice as a dissolution of the partnership, and claims all such rights and sums of money as he may be entitled to on that footing." It goes on further to make statements, none of which shew any waste or improper application of the partnership assets. It alleges that the partnership "is now without funds, and it has exhausted all its means of credit at the bankers and otherwise;" and upon those allegations the Plaintiff comes and asks this Court for a declaration of dissolution. First, he says a notice was given by his late partners, which he accepts, and then he asks for a declaration that the terms of the partnership have not been altered or varied by the Defendants' notice of dissolution or otherwise. That means there is a dispute between the parties, which by their contract they have agreed shall be referred to the tribunal at *St. Petersburg*. It asks, further, a declaration that the partnership was dissolved within the meaning of the 11th clause of the document dated the 3rd of August, 1876, that is, the Russian document; for a declaration that in the events which have happened the Defendants *Garrett* and *New* have become jointly and severally liable to pay the Plaintiff the sum of £3000. That is agreed to be referred to *St. Petersburg*. Then, "for an order on the Defendants to indemnify the Plaintiff from all liability for or on account of bills drawn or accepted by the Defendants or any one of them for other than partnership purposes, or in contravention of any of the articles of partnership." That plainly comes within the agreement to refer to the *St. Petersburg* tribunal. Then, "for the taking of preliminary accounts." That is open to the same observation. The next is "for the appointment of a receiver and manager of the partnership business with a view to the winding-up and sale thereof." Now, that leads me to the second question about a receiver. At the time the statement of claim was filed the proceedings in *Russia* were on foot. There had been a liquidation, and a receiver or liquidator was appointed; and yet there is not one word in the statement of claim upon that

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subject. It is passed over as non-existing. The clause providing for the reference to the *St. Petersburg* Commercial Court is also omitted. That cannot have been accidentally omitted. The Plaintiff also states that the two Defendants had appointed the Defendant *Froom* liquidator without his concurrence. If three partners out of four, a dissolution having taken place, agree to appoint a liquidator, I am not at all prepared to say that is not perfectly right. The Plaintiff was never consulted, he says, about the winding-up of the partnership business, but he accepted the notice of dissolution. He never had any notice that Mr. *Froom* was to be appointed liquidator, and he asserts that the acts of the Defendants in and about the winding-up, and so on, are null and void as against him. I cannot accept any such vague allegation as that. I say again, one of the questions between the parties was whether the reference should go to the tribunal of commerce in *St. Petersburg* or not, and knowing he was bound by the agreement to submit to that reference, he suppresses it, or at least omits it, from the statement of his claim. There then only remains to be considered, whether, upon the facts stated, a receiver should be appointed. I am very far from saying that it is of necessity that a receiver should not be appointed when there has been an agreement to refer to arbitration. On the contrary, in the case of *Plews v. Baker* (1) the receiver was appointed. For what reason? There were debts to be received accruing up to the time when the dissolution took place. Either partner would have a right to receive those debts; and for the common convenience of all the partners, and in justice to all of them, it was thought convenient that there should be one hand to receive those debts, and the Plaintiff was appointed by consent—the consent only goes to the person of the Plaintiff—to receive them. For every convenience it was necessary that it should be so, and that was the reason for it. I have heard no shadow of reason why a receiver should be appointed here. The concern is apparently insolvent. The terms of the partnership are distinctly stated, and one of those terms gives the Defendants a right to dissolve. It is said there is no money, that the means of carrying on the business are exhausted; but the dissolution has taken place. The Plaintiff is content with the dissolu-

(1) Law Rep. 16 Eq. 564.

tion, and yet he asks me to appoint a receiver upon such facts as are here stated. I can conceive no ground whatever why a receiver should be appointed, or why, even if it were only upon the ground of expense, there should be any interference by this Court. To stay these proceedings will do no harm, because there is, as I have said, a contract that their disputes, whatever they may be, should be referred to the tribunal in *St. Petersburg*. What may be the result of that reference to the tribunal in *St. Petersburg*, is not for me now to say. If the decision of the tribunal in *St. Petersburg* does not comprehend all that the Plaintiff thinks he has a right to assert against the Defendants, he may—I do not know whether he will or not—have an opportunity of resuming the proceedings here. For the present, until the partnership accounts are taken, for which the liquidator has been appointed, in whom all the rights that the partners had, I must assume, are vested, there is no reason why that proceeding should be interfered with; and it would be contrary to the principle of law now established, that that agreement to refer to a special tribunal should be interfered with by this Court, and that the jurisdiction of this Court should extend beyond the subject to which the parties to the contract agreed it should be confined. I am of opinion it is right that the proceedings should be stayed. I am also of opinion that no ground is alleged upon which it is requisite or would be just that a receiver should be appointed. There will therefore be an order on the Defendants' motion to stay proceedings in the terms of *Willesford v. Watson* (1), and the costs will be reserved.

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The Plaintiff appealed from both orders. The appeal came on for hearing on the 11th of January, 1878.

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Hemming, Q.C., and *Crossley*, for the Appellant:—

Argument.

The Court will appoint a receiver for the protection of the assets, at all events a receiver of the assets directed to be sent to *England*, which the Russian Court has no power to protect, even if it has power to appoint a receiver at all, which does not appear. A partner in a dissolved partnership has a right to a receiver without shewing special grounds: *Thomson v. Ander-*

(1) Law Rep. 8 Ch. 473.

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son (1); *Lindley* on Partnership (2). The appointment of a receiver is within the discretion of the Court, and looking at the conduct of the parties, the protection afforded by a receiver is requisite. Then as to the stay of proceedings, justice cannot be done in *Russia*, for the Russian Court will only take cognizance of the Russian deed, and the main object of the English action is to enforce the agreement for compensation. The jurisdiction of the Court is not ousted by the agreement to refer: *Cooke v. Cooke* (3); and it will not stay proceedings where there is a right to a receiver: *Willesford v. Watson* (4). The case is distinguishable from *Plews v. Baker* (5). A general winding-up is not within the scope of the agreement to refer. The taking the accounts of a partnership is not a "dispute."

Then on the other motion, the Court has no jurisdiction to stay proceedings except under the *Common Law Procedure Act*, 1854, and that plainly applies to arbitrations in the ordinary sense which are subject to the control of the Court, and not to agreements to refer to foreign Courts.

Even if there were jurisdiction in such a case, the agreement to refer here is limited to the matters comprised in the Russian deed, and not to any extraneous disputes such as that in respect of the compensation to the Plaintiff.

Sir *H. Jackson*, Q.C., and *J. Armstrong*, for the Defendants, were desired to confine themselves to the question as to staying proceedings:—

We say that the case is within the *Common Law Procedure Act*, 1854.

[JAMES, L.J.:—Have we jurisdiction to stay proceedings? Does the statute apply where the reference cannot be made a rule of Court?]

We say that the 11th section of the Act includes the case. It is true that we have not in the agreement here the word "arbitration," but arbitration is only a reference to a domestic forum chosen by the parties, and we therefore have the substance: *Gillett v. Thornton* (6).

(1) Law Rep. 9 Eq. 523, 533.

(2) 3rd Ed. p. 1066.

(3) Law Rep. 4 Eq. 77.

(4) Law Rep. 14 Eq. 572, 578.

(5) Ibid. 16 Eq. 564.

(6) Ibid. 19 Eq. 599.

[JAMES, L.J.:—Does not arbitration in the Act mean an arbitration in which the reference can be made a rule of Court, and over which the Court can exercise control?]

Section 11 is expressed in very wide terms, which are not cut down by any words of reference. The scope of the Act was to discourage litigation and keep the parties before the tribunal which they have chosen. The object of the agreement here was to keep the partnership out of Court, and the taking the accounts of the partnership is within its scope. An analogy in favour of this view is furnished by *In re Durham County Permanent Benefit Building Society* (1).

[JAMES, L.J.:—In that case there was an award.]

Hemming, in reply.

JAMES, L.J.:—

In the exercise of our discretion we do not think that it would be right to appoint a receiver of the assets of a Russian partnership which is being wound up in *Russia*, unless some special case of danger to the assets is shewn. We should not expect a Russian Court to appoint a receiver of the assets of an English partnership which is being wound up in an English Court, and we must assume that the Russian Court will do what is right. We will take time to consider whether there is anything to prevent our giving effect to the agreement to leave all matters in dispute to the Russian tribunal.

Feb. 15. BAGGALLAY, L.J., now delivered the judgment of the Court (*James, Baggallay, and Thesiger*, L.JJ.):—

In this case the Plaintiff appeals from two orders made by Vice-Chancellor *Bacon* on the 22nd of November last in an action for winding up the affairs of a partnership between the Plaintiff and the Defendants. By one of such orders the Vice-Chancellor refused an application of the Plaintiff for the appointment of a receiver, and by the other, upon the application of the Defendants, he stayed all proceedings in the action until further order, reserving liberty to any of the parties to apply.

(1) Law Rep. 7 Ch. 45.

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Both orders were based upon the circumstance that the articles by which the partnership was regulated contained provisions for the reference of all matters in dispute to arbitration.

The partnership was entered into in 1876 for the purpose of carrying on the business of engineers and merchants in *St. Petersburg*.

The articles, which bear date the 3rd of August, 1876, are in the Russian language, they were executed in *Russia*, and were registered in that country in accordance with the requisitions of Russian law.

Provision for the reference of disputes to arbitration was made by the 17th article, of which the following is a translation:—"In case of any disputes arising between the parties to this agreement, or their executors, such disputes, no matter how or where they may arise, shall be referred to the *St. Petersburg* Commercial Court, or to any Court which may have taken its place, the decision of such Court shall be final."

Under the 11th article the Defendants *Garrett* and *New* were entitled within the first year to demand payment of their capital, and if the demand was not complied with within a month the firm were to proceed to liquidation. On the 21st of June, 1877, being within a year from the commencement of the partnership, the Defendants *Garrett* and *New* gave notice demanding payment of their capital, and such payment was not made within a month.

It is the common case of the Plaintiff and of the Defendants that the partnership was dissolved by that notice. Steps were accordingly taken by the Defendants *Garrett* and *New* in *St. Petersburg* to wind up the affairs of the partnership, and the Defendant *Froom* was appointed liquidator and receiver for that purpose. The Plaintiff thereupon commenced the present action, and on the 4th of October, 1877, served the Defendants with notice of motion for the appointment of a receiver, and on the 11th of the same month the Defendants served a counter-notice on the Plaintiff for a stay of proceedings in the action and a reference of all matters in dispute to the *St. Petersburg* Commercial Court.

Now, if there had been no other material facts in the case than those just stated, the orders made by the Vice-Chancellor could hardly have been resisted; it would have been a case for the exercise of the discretion conferred upon the Vice-Chancellor by

the 11th section of the *Common Law Procedure Act* of 1854, and such discretion could hardly have been exercised otherwise than in the way in which it has been exercised by him. In the course of the argument on the part of the Appellant, some reliance was placed upon the case of *Cooke v. Cooke* (1). In that case the question was raised by plea, and all that Vice-Chancellor *Wood* decided was that the jurisdiction of the superior Courts was not ousted by the provisions of the *Common Law Procedure Act*. That such jurisdiction was not ousted is clear from the terms of the Act itself, which merely confers upon the Court applied to the power to order a stay of proceedings upon being satisfied that no sufficient reason exists why the matters cannot or ought not to be referred to arbitration according to the agreement.

We entirely concur in the views expressed by Lord *Selborne* in the case of *Willesford v. Watson* (2), to the effect that if since the passing of the *Common Law Procedure Act* parties choose to determine for themselves that they will have a forum of their own selection instead of resorting to the ordinary Courts, a *prima facie* duty is cast upon the Courts to act upon such arrangement.

Now, is there anything in the present case to rebut the *prima facie* case arising out of the 17th article? It is true that the Plaintiff prays for an injunction, and if a case for an injunction was made by the evidence, that would probably be a sufficient reason for refusing to send the matter to arbitration; but no such case is made, indeed it is somewhat difficult to make out from the pleadings or the evidence in respect of what the injunction is asked.

A claim is also made for the appointment of a receiver, but, with the exception of the circumstance to which we are about to allude, no case whatever is made which could call for such an appointment.

By the 4th paragraph of what may be called the prayer of the claim, the Plaintiff asks for a declaration that in the events which have happened the Defendants *Garrett* and *New* have become jointly and severally liable to pay the sum of £3000. This claim arises in the following way: It appears that before and down to the month of June, 1876, the Plaintiff was engaged in business on

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(1) Law Rep. 4 Eq. 77.

(2) Law Rep. 8 Ch. 473.

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his own account as a merchant at *Moscow*, and during the negotiations for the partnership arrangements were made for the transfer of this business to the new firm, and for this purpose two memoranda of agreement were prepared. Both bear date the 10th and 22nd of July, 1876; one provided for the discontinuance by Mr. *Law* of his business at *Moscow*, and for the transfer of such business to the new firm, and by the other, which purported to be made between the Plaintiff and the Defendants *Garrett* and *New* only, but as to the execution of which by those Defendants there appears to be a question, provision was made that in the event of the partnership being liquidated or dissolved within one year, by reason of the exercise by the Defendants *Garrett* and *New* of certain powers conferred or to be conferred upon them by the articles of partnership, the Plaintiff should be compensated by the making over to him of the firm's business at *Moscow*, and of goods of the estimated value of £3000.

Under these circumstances it has been contended on the part of the Plaintiff that his right to this sum of £3000 cannot be enforced in the Russian Court, and that for his protection in respect of it a receiver ought to be appointed, if not of all the assets of the firm, at any rate of such moneys or other assets as may be brought to this country. We are by no means satisfied that his rights in respect of this sum, if he has any, as to which we express no opinion, cannot be properly adjudicated upon and enforced in the Russian Court; but however this may be, we are of opinion that until it is shewn that no adequate relief in respect of such rights can be obtained by him in the course of the proceedings in *Russia*, it would not be proper by the appointment of a receiver to impede the general liquidation of the partnership in the manner in which the partners have themselves decided that it shall be liquidated.

Should it appear in the course of the liquidation that the Plaintiff's rights and interests are not adequately protected, an immediate application can be made to the Vice-Chancellor under the reservation contained in his order, which, it is to be observed, is not an absolute order for the stay of proceedings, but one which merely stays proceedings in the action until the result of the proceedings before the *St. Petersburg* Commercial Court shall be known, or until further order shall be made by the Vice-Chancellor; and

any of the parties have liberty to apply as to continuing the action, and generally on the result of the proceedings in the *St. Petersburg Court*.

Both appeals must be dismissed with costs.

Solicitors: *Carr, Bannister, & Co.; F. T. Dubois.*

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[1876 N. 46.]

Landlord and Tenant—Quiet Enjoyment—Premises let for Purpose subsequently made illegal—Warranty of Legality—Eviction—Practice—Amendment.

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The Defendant let the basement of a store to the Plaintiff "with full and undisturbed right and liberty to store cartridges therein," and covenanted to keep the premises in proper repair and condition, so as to be available for storing cartridges, and covenanted for quiet enjoyment. Other parts of the store were at that time let to other persons for storing gunpowder. Soon afterwards the *Explosives Act*, 1875, passed, making it illegal to store cartridges and gunpowder in the same building. The Defendant, upon the Act coming into operation, removed the Plaintiff's cartridges out of the building. A correspondence ensued, and the Defendant stated to the Plaintiff that the basement was at the Plaintiff's disposal, but that if the Plaintiff stored cartridges there the Defendant must, to protect himself from liability, give notice to the authorities. The Plaintiff thereupon commenced his action to restrain the Defendant from obstructing the storing of his cartridges, and to compel the Defendants to do everything necessary to enable the Plaintiff to store them there, and for damages:—

Held, by *Fry, J.*, that the Plaintiff was entitled to damages for the loss of the use of the demised premises, on the ground that the Defendant's acts amounted to eviction.

Held, by the Court of Appeal, that judgment must be entered for the Defendant for that, 1, there had been no eviction, the removal of the Plaintiff's cartridges being only a trespass; and, 2, there had been no breach of covenant by the Defendant, for that the covenant to keep the premises in proper condition for storing cartridges only referred to their physical condition; and that the grant of liberty to store cartridges there did not import a warranty of the legality of so storing them, nor did anything in the lease bind the Defendant to procure licenses to make the storage legal.

Semble, an amendment converting a claim on the footing of a subsisting lease into a claim on the footing of eviction ought not to be allowed.

By an indenture of lease dated the 12th of April, 1875, and made between *J. C. Sharpe*, the Defendant and lessor, of the one

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16 Ch D 443
19 Ch D 20
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part, and *E. H. Newby*, the Plaintiff and lessee, of the other part, the lessor demised to the lessee all the basement story of a gunpowder magazine or warehouse situate at *Barking*, in the county of *Essex*, "together with the full and undisturbed right and liberty to store cartridges therein," for the term of three years, to be computed from the 12th day of April, 1875, yielding and paying during the first year of the term the clear rent of £150, and during the second and third years of the term the rent of £200, at the times and in the manner in the said lease mentioned. And the lessor covenanted that he would during the term keep the premises thereby demised, and also the pier or landing-place adjoining and belonging thereto, "in proper repair and condition, so that the same may at all times during the said term be available by the lessee, his executors, administrators, and assigns, for the storing, landing, or shipping away of cartridges;" and that the lessor would keep a proper storekeeper, who should receive and deliver out the cartridges, the lessee providing the labour. And the lessor, for himself, his heirs and assigns, covenanted with the lessee, his executors, administrators, and assigns, that he, the said lessee, his executors, administrators, or assigns, paying the rents and observing and performing the covenants and agreements therein reserved and contained, might peaceably and quietly have, hold, occupy, and enjoy all and singular the premises thereby demised, with their appurtenances, for and during the term thereby granted, without the let, suit, or eviction of or by the said lessor, his heirs, or assigns.

The Plaintiff took possession of the demised premises and stored cartridges in them. Other parts of the magazine were under lease to other persons for the storage of gunpowder. One of the leases was for twenty-one years from 1869 to the *Kennall Vale Gunpowder Company*; and at the time when this action was commenced the company had about 40,000 lbs. of gunpowder stored there.

On the 14th of June, 1875, an Act, 38 Vict. c. 17, called the *Explosives Act*, 1875, was passed, providing for the licensing of gunpowder magazines and factories. By sect. 9 it was enacted that the factory or magazine, or any part thereof, should not be used for any purpose not in accordance with the license; and it was enacted that in the event of any breach of this section, the

gunpowder or ingredients thereof in respect to which or being in any building, or machine in respect to which the offence was committed, might be forfeited, and the occupier should be liable to penalties. By sect. 10 it was provided that, "(1) In a factory every factory magazine, and in any other magazine every building in which gunpowder is kept shall be used only for the keeping of gunpowder and receptacles for or tools or implements for work connected with the keeping of such gunpowder." It was stated that the Home Office held this clause to prohibit the storage of cartridges, containing means of ignition, in the same building with gunpowder. By sect. 14 it was provided that "the occupier of any lawfully existing magazine may until the expiration of the time within which he is required to send to the Secretary of State an application for a continuing certificate (namely, before the expiration of three months after the commencement of the Act) carry on his business in such magazine in like manner as if this Act had not been passed." The Act came into operation on the 1st of January, 1876.

On the 25th of March, 1876, the Defendant wrote to the Plaintiff stating that he regretted being unable to arrange to remove the gunpowder from the magazine, and that, as under the new Act it was illegal to store cartridges in the same building with gunpowder after the 31st instant, he had arranged for the removal of the Plaintiff's cartridges temporarily into an adjoining building. The Plaintiff on the 29th wrote back, "I have your favour of the 25th instant, and learn with surprise that you have removed, or propose to remove, my cartridges from a place I have leased of you for a term at present unexpired. I must beg of you to do nothing of the kind, and as to the removal of the gunpowder, that becomes really imperative now, as in a very few days I shall have several millions of cartridges at the magazine which must be at once stored." The Defendant replied on the 31st, "Since writing you on the 25th, I am informed on high authority that under the *New Explosive Substances Act*, cartridges having their own means of ignition cannot be stored in a gunpowder magazine (with or without powder stored in it) under a continuing certificate. A new license must be got and a new building erected. The space now leased to you is held at your disposal, but looking at the

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liability to serious penalties of all parties, and the certainty of a seizure, I should feel myself obliged at once to report the circumstances to the authorities before the cartridges are landed, to relieve myself from the onus. I regret it should be so, as I have no interest but to meet your views."

The Defendant on the same 31st of March removed the Plaintiff's cartridges out of the magazine into a wooden building which he had placed at the rear of the magazine. They were subsequently seized by the Government, but were ultimately given up to the Plaintiff and removed by him.

On the 13th of April, 1876, the Plaintiff's solicitors gave the Defendant formal notice that the Plaintiff required the Defendant to store about 4,000,000 of cartridges, which were daily expected in the River *Thames*. The Defendant replied, "I am in receipt of your letter, but I scarcely see the utility of the notice it contains, as the space leased by us to Mr. *Newby* is always at his disposal. I am not aware that in my recent correspondence with Mr. *Newby* I have ever stated otherwise, but have rather pointed out the bearing of the *New Explosives Substances Act* upon the lease in question."

On the 24th of April, the Plaintiff commenced this action. By the statement of claim the Plaintiff set out the material parts of the lease, omitting the covenant for quiet enjoyment, and stated that he had paid all the instalments of rent that had become due. He then stated the notice of the 13th of April, 1876, and went on to allege that the cartridges there mentioned had arrived, and that the Defendant refused to receive and store them. He then went on to state that he was obliged, as a temporary measure, to store them in Government barges at a considerable expense. The Plaintiff claimed an injunction to restrain the Defendant from obstructing the storing of the cartridges on the demised premises, and that the Defendant might be ordered to do everything necessary or proper to enable the Plaintiff to deposit the cartridges there, and to render such premises fit and proper for the legal deposit therein of loaded cartridges. The claim also asked for damages.

The action came on for trial before *Fry, J.*, on the 10th and 11th of July, 1877.

Swanston, Q.C., and *Owen*, for the Plaintiff:—

The Plaintiff must be entitled to damages for his loss. The Defendant when he granted the lease must have known that this Act was about to be passed. It is not proved that he has made any attempt to get the other lessees to remove the gunpowder, and he must take his choice which he will keep, giving compensation to whichever is damaged. There is a clear breach of covenant, and though the performance of a covenant may have become impossible, damages for non-performance have often been given: *Lord Clifford v. Watts* (1); *Baily v. De Crespigny* (2); *Brown v. Royal Insurance Company* (3); *Hale v. Rawson* (4).

As to the omission to set out the covenant for quiet enjoyment and the breach of it, we ask leave to amend.

FRY, J., gave leave to amend.

North, Q.C., and *Langley*, for the Defendant:—

There has been no let, suit, or eviction by the Defendant, and the store remains as it was, except that the cartridges are liable to forfeiture. The Defendant has no means of turning out his lessees, and the Plaintiff must have known at the time that gunpowder was stored there. The Defendant has, in fact, saved the Plaintiff from loss. But even if the Defendant has prevented the storage of cartridges, the Plaintiff cannot recover damages, as the Defendant has been obliged by the alteration of the law to take this course: *Brewster v. Kitchell* (5); *Sutton v. Temple* (6); *Doe v. Rugeley* (7); *Mayor of Berwick v. Oswald* (8); *Brown v. Mayor of London* (9). The Court would not enforce such a covenant, and therefore ought not to give damages.

FRY, J., after stating the lease, continued:—

The first point to which I would advert is the question of the amendment of the pleadings. The statement of claim does not

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(1) Law Rep. 5 C. P. 577.

(2) Ibid. 4 Q. B. 180.

(3) 1 E. & E. 853.

(4) 4 C. B. (N.S.) 85.

(5) 1 Salk. 198.

(6) 12 M. & W. 52.

(7) 6 Q. B. 107.

(8) 3 E. & B. 653.

(9) 9 C. B. (N.S.) 726.

5 per H.S. 1255.

6 per H.S. 363.

7 per H.S. 395.

7 per H.S. 729.

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set out the covenant for quiet enjoyment, nor does it set out an alleged breach of that covenant on the 31st of March, 1876. But I gave leave for an amendment of the statement of claim, and for this reason, that I think the material issues are better brought before the Court on such an amendment, and that it is quite clear that there is no surprise on the Defendant by allowing the amendment, because the Defendant has in his statement of defence set out the covenant for quiet enjoyment, and in his evidence by way of affidavit filed at the hearing on this question, has himself stated with precision the breach of the 31st of March.

His Lordship then, after stating the other facts of the case, continued:—

After the correspondence the Plaintiff never stored or attempted to store any cartridges in the building, and I think he was justified in so doing. The cartridges he had stored had been removed against his wish, and he had further received an intimation from the Defendant that if he, the Plaintiff, did store cartridges there, the Defendant would immediately give notice to the authorities, with a view to the seizure of those cartridges. Under these circumstances, I think he was justified in considering that the Defendant had evicted him, and that he was not bound again to take possession of the basement story demised to him, and thereupon he brings his action.

Now, the first question I have to consider is with regard to the covenant of the lessor, that he will at all times keep the premises in fit and proper repair and condition, so that the same may at all times be available by the lessee for the storage, landing, and shipment of cartridges. Upon this, my opinion is that the word "condition" does import a covenant, which has been broken. I think that the effect of the Act of 1875 was to render it impossible for the Plaintiff to store cartridges in that building if the adjoining part of the building was used for storing gunpowder, and if no license was obtained for the user of the building for the purposes of storing both those kinds of explosives; and when a building is in such a state that the cartridges there stored are liable to seizure, it is not, in my opinion, a building available for the storage of cartridges within the meaning of the covenant. I think that if the Defendant had entered into obligations which

allowed other persons the right to put gunpowder in the adjoining store, and did not obtain a license justifying that storage, the Act of Parliament having intervened, he had brought the demised premises into a condition in which they were not fit and proper for the purpose of the demise, and in which they were not within the meaning of the demise available for the purpose of storing cartridges, and, consequently, there is a breach of that covenant.

Then it is said that there is an impossibility to perform the covenant, and that that impossibility was caused by an Act of Parliament, and that where that is so the covenantor is relieved from the obligation. Now, in the first place, I am not satisfied that it was impossible for the Defendant to get rid of the rights of the lessees, or to put an end to the agreements between himself and his lessees. In the second place, I do not find that he ever made the proper application to the Home Office for the license requisite to enable him to carry the terms of the lease into effect. If he had applied for a license justifying the storing of gunpowder and cartridges during such time as the leases to the other lessees and the lease to the Plaintiff required the storing of those kinds of explosives at the same time, and that had been refused, the impossibility in that respect might have been made out. But it is not proved that any such application was made, and, in fact, I think it is proved that no such application was made. The applications made by the Defendant to the Home Office were of two kinds. The one was for a continuing license to use the magazine for gunpowder, and that of course would not justify the storage of cartridges in the same magazine. The other was, so far as I can gather, a claim to store cartridges in an unlicensed place by virtue of another section of the *Explosives Act*. That was refused, and he was told he must take the necessary steps to place the cartridges in a place where they could lawfully be stored, and those steps it does not appear he ever took. Therefore I am of opinion that he has not shewn that he could not have obtained a license which would have removed all difficulty.

But further than that I do not think that this case comes within the class of cases to which reference has been made. The principles which govern it are sufficiently shewn by the case of

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Brewster v. Kitchell (1), in which Lord *Holt* laid down that where *H.* covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant. But in that case the covenant and the Act of Parliament were in direct and immediate opposition to one another, and the two could not stand together. Either the Act must be overcome by the covenant, or the covenant must be overcome by the Act, and the Act of course prevailed. The second proposition laid down is, that if *H.* covenants to do a thing which is lawful, and an Act comes in and prevents him, the covenant is repealed. The same observations apply there, and it is impossible that a covenant to do a thing and an Act which says you shall not do a thing can stand together, and of course the private agreement yields to the public legislation. In this case, if there is an impossibility, it is an impossibility created by the joint operation of an antecedent bargain entered into by the Defendant, and a subsequent Act of Parliament which comes in and operates upon that antecedent bargain. In that state of circumstances the Act cannot be treated otherwise, or put higher as relieving the Defendant, than the act of God, with regard to which it appears clear that in such a case the act of God would not relieve the Defendant from liability for non-performance of his contract. The law upon that subject appears to me to be very clearly stated by Mr. Justice *Willes* in the case of *Lord Clifford v. Watts* (2). He says, "Where a thing becomes impossible of performance by the act of a third person, or even by the act of God, its impossibility affords no excuse for its non-performance. It is the Defendant's own folly which has led him to make such a bargain without providing against the possible contingency." In my opinion that principle applies to Acts of Parliament where the impossibility is caused by the Act of Parliament, and by something done or suffered by the contracting party on which the Act of Parliament operates. Therefore, in my opinion, if it were the fact that the Defendant is not able to perform his obligation, that would not relieve him.

There remains to be observed that it is not necessary to rely on the covenant to which I have referred. It appears to me that the

(1) 1 Salk. 198.

(2) Law Rep. 5 C. P. 577, 586.

Plaintiff has made out his case on the covenant for quiet enjoyment, because the act of the Defendant in removing the cartridges of the Plaintiff from the demised premises was an eviction or interruption of the enjoyment of those premises done by the lessor himself, and was a thing against which he had covenanted.

The only question which remains for consideration is the amount of damage. Now with regard to that Mr. *North* did not address me, and it appears to me the Plaintiff has put his claim for damages on the right footing. From the eviction in March down to Christmas, 1876, he was obliged to store his cartridges in barges which he hired for the purpose at an expense of £685 7s. He has also been put to certain expenses consequent on the necessary removal of the cartridges into those barges. He also charges demurrage on a ship which was detained in consequence of the act of the Defendant, but that appears rather too remote, and I do not propose to give any damages in respect of that. It appears to me, if I take the sum of £750 as the sum at which I put the damage sustained by the Plaintiff, irrespective of the allowance to be made for rent, that will be a proper estimate. I propose, therefore, to give damages at £750, less the three quarters rent, which would be £150, and that will make the damages £600. Of course the Plaintiff is entitled to the costs of the action.

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The Defendant appealed. The appeal came on for hearing on the 23rd of February, 1878.

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North, Q.C., and *Langley*, for the Appellant:—

Argument.

There is no implied covenant that the place shall be fit for the lawful storage of cartridges: *Sutton v. Temple* (1); *Erskine v. Adeane* (2). Neither, on the fair construction of the lease, is there any express covenant to that effect, and if there were, the Defendant would be released by the Act of Parliament. *Ogilvie v. Foljambe* (3), *Stanley v. Hayes* (4), are against the Plaintiff. Relief on the ground of eviction cannot be obtained on these pleadings: *Cawley v. Poole* (5).

(1) 12 M. & W. 52.

(3) 3 Mer. 53.

(2) Law Rep. 8 Ch. 756.

(4) 3 Q. B. 105.

(5) 1 H. & M. 50.

C. A. *Swanston, Q.C., and Owen, for the Plaintiff:—*

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Argument.

It was the duty of the lessor under his covenants to get a license, and he might have got it under sect. 40, sub-ss. 6 and 7; but if he could not, we say that the Act does not relieve him from the consequences of his not fulfilling his bargain to let a place fit for storing cartridges: *Brewster v. Kitchell* (1); *Hale v. Rawson* (2); *Brown v. Royal Insurance Company* (3); *Lord Clifford v. Watts* (4); *Baily v. De Crespigny* (5). We could not apply for a license, for we are not occupiers of the building, sect. 14, and we could not furnish the plans of the top story which would be required. There is a breach of the covenant for quiet enjoyment: *Shaw v. Stenton* (6).

Judgment, C. A. JAMES, L.J.:—

This case depends entirely on the construction of the express covenants entered into by the Defendant, and if those covenants are not wide enough to enable the Plaintiff to obtain all he hoped to obtain, the observation applies which has been made in several of the cases, that it was "his own folly" not to obtain more extensive covenants. In my mind it is reasonably clear that the covenant to keep the property in good condition and repair merely relates to its physical condition, and I cannot follow the reasoning by which Mr. Justice *Fry* arrived at the conclusion that the word "condition" imposed on the lessor an obligation to obtain from the proper authorities all licenses which should be necessary to enable the Plaintiff to have the enjoyment of the basement for the purposes for which he took it. At the time when the lease was granted both parties were aware that there was pending in Parliament a bill to make further regulations as to the storing of explosive substances, and if the Plaintiff intended to be guaranteed by the Defendant against any effect which such regulations might have on his use of the demised property, he ought to have insisted upon having stipulations for that purpose inserted in the lease. He did not do so, but chose to take the risk. It turns out that, by reason of the provisions of the Act, the Plaintiff cannot

(1) 1 Salk. 198.

(2) 4 C. B. (N.S.) 85.

(3) 1 E. & E. 853.

(4) Law Rep. 5 C. P. 577.

(5) Ibid. 4 Q. B. 180.

(6) 2 H. & N. 858.

store cartridges in the basement demised to him. That is a misfortune imposed on him by the Legislature, and I can see nothing in the lease to throw upon the Defendant the burden which the Legislature has thus thrown on the Plaintiff. I am of opinion, therefore, that the Plaintiff's claim is utterly unsustainable, and that the Defendant has not broken any obligation to which the lease made him liable.

At the hearing an amendment was allowed which appears to me to be of an unprecedented description, as it entirely alters the nature of the case made. The claim was based on the continuance of the relation of lessor and lessee between the parties, the amendment is based on an eviction of the Plaintiff by the Defendant, entitling the Plaintiff to damages. The case of eviction was not raised by the claim, and the Defendant had not been called upon to meet it. I am of opinion, however, that there was not any eviction. The mere removal of the cartridges on the 31st of March was no eviction, it could not amount to anything more than an act of trespass, and it was an act of precaution which really was for the benefit of the Plaintiff. The cartridges while in the basement were liable to seizure under the provisions of the Act, and the Defendant removed them to another building that they might not be liable to be seized. Then what passed afterwards was in substance this: The Defendant said to the Plaintiff, "This space is demised to you, and is at your disposal; you can, if you choose, store cartridges there at your own risk. I shall not prevent your doing so, but if you do so, I must, for my own protection, inform the inspector of it." This is no refusal to allow the Plaintiff to store the cartridges upon the premises; anybody is at liberty to inform the inspector that a person is storing cartridges, though it may be an unneighbourly act to do so without giving him any warning, and all the Defendant did was to give the Plaintiff such warning. There was no eviction, nor can it be said that the Plaintiff has sustained damage through anything the Defendant has done. The Plaintiff, it is true, has not been able to use the basement for storing cartridges, but the sole reason of this is that he knew they would be liable to forfeiture if he landed them there. He has been obliged therefore to stow them in barges, and has suffered some loss, but it is owing to the act of

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C. A. the Legislature, not of the Defendant. No default on the part
 1878 of the Defendant has been made out, except a trivial act of
 NEWBY trespass, and I am of opinion that there ought to have been
 v. judgment for the Defendant with costs.
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Judgment, C. A. BAGGALLAY, L.J. :—
 Baggallay, L.J.

I am of the same opinion.

The Plaintiff by his statement of claim asks for an injunction to restrain breaches of covenant, and for damages. The breach alleged is a refusal to receive and store the Plaintiff's cartridges, and the only issue tendered is, was there such a refusal or not. I am of opinion that there clearly was not, so that no case is made entitling the Plaintiff to relief on the grounds alleged by his statement of claim. Then at the hearing an amendment was allowed. Now I am disposed to agree with Mr. Justice *Fry* as to the propriety of allowing that amendment so far as it consisted in setting out the covenant for quiet enjoyment, since both parties relied on it, and it was set forth in the defence. But I cannot regard in the same way so much of the amendment as introduced an allegation as to the removal of the cartridges. I think the Defendant merely removed the cartridges in order to protect the Plaintiff from incurring a forfeiture, and I do not consider it proper to allow it to be introduced to establish a case of eviction which was not raised in the original statement of claim.

Thesiger, L.J. THESIGER, L.J. :—

I also am of opinion that this appeal must be allowed. The decision in the Court below went on the ground that the removal of the Plaintiff's cartridges by the Defendant on the 31st of March was an eviction. I cannot concur in this view. It is a mistake to suppose that a temporary trespass by a landlord, unaccompanied by any intention to put an end to the tenancy, is an eviction. This is shewn by the form of a plea of eviction given in *Bullen and Leake's Precedents of Pleading* (1), "That the Plaintiff without the consent and against the will of the Defendant wrongfully entered into and upon the said messuage and premises and evicted

(1) 3rd Ed. p. 635.

the Defendant from the possession, use, and occupation thereof, and kept him so evicted thenceforth hitherto." Again, in *Wms. Saunders* (1), Mr. Justice *Williams* says: "And the plea must state an eviction or expulsion of the lessee by the lessor, and a keeping him out of possession until after the rent became due; otherwise it will be bad. A trespass by the lessor will be no suspension of the rent. Therefore where to an avowry for rent the Plaintiff pleaded in bar that the Defendant, the lessor, with force and arms unjustly and unlawfully entered upon the garden part of the messuage or tenement in the Plaintiff's possession, and did then and there with like force and arms unjustly and unlawfully break and pull down the roof and ceiling of a summer-house, part of the said premises, and tore up the benches thereon; by means whereof the Plaintiff had been deprived of the use of the summer-house from, &c., until &c., this plea was held ill on demurrer, for it states merely a trespass; the Plaintiff should have pleaded an eviction; and it would have been for the jury to decide whether the facts stated amounted to one." This shews that in considering whether there is an eviction you must look not merely at the act of entry but to the circumstances of the case, and the intention with which the entry was made. Here it is plain, first, that the landlord's entry was not intended to put an end to the tenancy; secondly, that it was merely temporary; and thirdly, that it was made only to meet an emergency arising from the recent Act which put the Plaintiff in danger of criminal proceedings and penalties. The Plaintiff himself was so far from treating the removal of the cartridges as an eviction that he treated the tenancy as still subsisting, and brought an action on that footing. So far as the amendment raised the new case of eviction, it ought not to have been allowed, for it changed the whole nature of the action; but supposing the case of eviction to be properly raised, my opinion is that it wholly fails.

Then is there anything to shew that the Defendant has been guilty of breaches of covenant. It was argued by Mr. *Owen* that the grant of "full and undisturbed right and liberty to store cartridges therein," and the covenant to keep the premises in proper condition so as to be available for the storing of cartridges, made a sort of warranty against the acts of everybody. But it seems to

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(1) Vol. i. p. 208, n. 2.

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me that these clauses must be read in connection with the covenant for quiet enjoyment, and cannot be taken to mean more than that, so far as regards the physical condition of the premises and the acts of the lessor, the lessee shall have the right of storing cartridges there. Suppose the Legislature to pass an Act enacting that cartridges should in no case be stored in a magazine, it could not be contended that the lessor had given a warranty against that, and there is no better reason for saying that he has given a warranty against the Legislature forbidding the storing of cartridges under certain circumstances.

In construing the covenant to keep the premises in proper condition, the maxim *noscitur a sociis* applies, and it is clear that it means nothing but physical condition. If the Legislature had required the floor to be made of a certain thickness, or imposed any other similar condition, it may be that this covenant would have bound the vendor to make the premises comply with such condition; but I cannot find anything in it by which the lessor guarantees liberty to store on this property or imposes on himself the obligation of getting licenses to store there. In spite of the argument addressed to us, I can see nothing to prevent the Plaintiff himself from applying for a license. The words used in the Act, "magazine" and "store," do not necessarily relate to the whole of a building. Different rooms in a building may be used for different kinds of goods, and if it is wished to use one for storing gunpowder, I see no reason why the occupier of that one may not apply for a license.

Solicitors: *Harper, Broad, & Battecock; Clarke & Calkin.*

Ex parte HOPPER. *In re* ELLIOTT.

Bankruptcy—Pending Proceedings for Composition—Costs—Varying Provisions of Composition—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 126—Bankruptcy Rules, 1870, rr. 292, 297.

The creditors of a debtor who had filed a liquidation petition resolved to accept a composition of 15s. in the pound, payable in four instalments, to be secured by the joint and several promissory notes of the debtor and a surety. The resolution was registered, and the receiver who had been appointed gave up possession of the estate to the debtor. The promissory notes were delivered to the creditors. When the first instalment became due neither the debtor nor the surety could pay it. Two days before it became due the debtor's solicitor applied to the Court for leave to summon a meeting of the creditors for the purpose of submitting a resolution to vary the provisions of the composition. Leave was given, but the receiver was reappointed. A meeting was held, and it was resolved to accept a composition of 3s. in the pound, payable in three instalments, the second and third of which were to be guaranteed by sureties. The resolution was confirmed at a second meeting, but registration was refused, and the debtor was adjudicated a bankrupt. The debtor's solicitor applied to the Court to order the costs of the abortive proceedings to reduce the composition to be paid out of the bankrupt's estate, but the application was refused in the County Court and afterwards by the Chief Judge:—

Held, that the abortive proceedings were not "pending" at the time of the bankruptcy, within the meaning of rule 292 of the Bankruptcy Rules, 1870, and that at any rate the exercise by the County Court of the discretion given to it by the rule ought not to be interfered with; and that the proceedings to reduce the composition were not authorized by the 6th clause of sect. 126 of the *Bankruptcy Act, 1869*.

Ex parte Jeffery (1) distinguished.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 22nd of January, 1877, *W. Elliott* filed a liquidation petition in the *Newcastle-on-Tyne* County Court, the solicitor acting for him being *Mr. R. S. Hopper*. A receiver was appointed. The first meeting of the creditors was held on the 15th of February. The debtor's statement of affairs then produced shewed that his assets were £2607 13s., and his liabilities £4202 14s. 5d. The creditors resolved to accept a composition of 15s. in the pound, payable in four instalments, in four, eight, twelve, and sixteen months, and secured by the joint and several promissory notes of the debtor and his mother. The receiver was appointed trustee, to

(1) Law Rep. 9 Ch. 144.

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receive the promissory notes and distribute them among the creditors. These resolutions were confirmed at the second meeting of the creditors on the 26th of February, 1877. The resolutions were registered, and the receiver gave up possession of the estate to the debtor, received the promissory notes and distributed them to the creditors. The first instalment of the composition became due on the 30th of June, 1877, but neither the debtor nor his mother was able to pay it. On the 28th of June, 1877, *Hopper* applied to the Court, under the 6th clause of sect. 126 of the *Bankruptcy Act*, 1869, for leave to summon another general meeting of the creditors, for the purpose of submitting a resolution to vary the provisions of the composition previously accepted. The Court gave leave, but reappointed the receiver. *Hopper*, proceeding as if a new liquidation petition had been filed, summoned a meeting of the creditors, which was held on the 17th of July, when the creditors resolved to accept a composition of 3s. in the pound, payable in three instalments, the second and third instalments being guaranteed by sureties, and that the receiver should be continued in his office until after the second general meeting. At the second meeting, held on the 24th of July, these resolutions were confirmed, but the Registrar, on the 26th of July, refused to register them, on the ground that they were irregular. This refusal was confirmed by the Judge, and his decision was not appealed from. On the 26th of July one of the creditors presented a bankruptcy petition against the debtor, and he was, on the 28th of July, adjudicated a bankrupt. *Hopper* carried in in the bankruptcy his bill of costs of the abortive proceedings to reduce the composition; and on the 12th of September the Registrar taxed the bill at £33 10s. 6d. *Hopper* then applied to the Court under rule 292 to order this sum to be paid out of the bankrupt's estate. The Judge refused the application. *Hopper* appealed to the Chief Judge.

The appeal was heard on the 21st of December, 1877.

Argument.

De Gex, Q.C., and *Finlay Knight*, for the Appellant, referred to rule 292 (1) and to *Ex parte Jeffery* (2).

(1) Rule 292: "Where bankruptcy occurs pending proceedings for or towards liquidation by arrangement or composition with creditors, the proper costs incurred in relation to such pro-

ceedings shall be paid by the trustee under the bankruptcy out of the debtor's estate, unless the Court shall otherwise order."

(2) Law Rep. 9 Ch. 144.

Winslow, Q.C., and *Creed*, for the trustee in the bankruptcy, contended that *Ex parte Jeffery* (1) did not apply, and referred to rule 297 and to *Ex parte Sydney* (2).

De Gex, in reply.

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BACON, C.J. :—

The question is really an exceedingly simple one. It is said that the 292nd rule justifies this application. I do not think that under that rule, or upon any other principle that can be suggested, it is possible to support this appeal. The 292nd rule has at the end of it the words “unless the Court shall otherwise direct,” which are intended to qualify, and do qualify, the whole of the rule, and keep alive that wholesome jurisdiction which the Court has to exercise over the conduct of all parties concerned in the administration of any bankruptcy or insolvency. Here the Court, with full knowledge of all the circumstances, in the exercise of its lawful power, and, in my opinion, in the exercise of its most sound discretion, did “otherwise order,” and upon that ground alone I should not think of interfering with it. But I do not rest my judgment upon that point alone. Can anybody say that any proceedings were pending in respect of what is called the attempt at a second composition? There had been a meeting called, and resolutions had been passed. They were brought to the Registrar to be registered, and until registered they were of no validity. The Registrar absolutely refused to register them, and his decision was affirmed by the County Court Judge, and there has been no appeal against that decision. The time for appealing has elapsed, and there can be no question that it is not in my power or in the power of any other person to interfere with the effect of the Registrar’s refusal to register. When he refused there was an end of the second composition, and then the very words of the rule, which is equivalent to an Act of Parliament, have no application to the case, because bankruptcy did not occur pending any proceedings relating to a composition, but after the abortive attempt to establish a second composition had utterly failed. So that, read it in any way you will, there was no warrant in that rule for this application.

(1) Law Rep. 9 Ch. 144.

(2) Law Rep. 10 Ch. 208.

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But I do not think that the case ought to be disposed of with that observation alone, because I think the proceeding that has been taken is in all respects utterly irregular and wrong. I do not think it competent for a debtor or his solicitor, by any contrivance which their ingenuity may devise, to get rid of that rule which has been established in this Court, that you cannot have a second petition for composition on failure to observe the terms of the first. This is only an attempt to get a second composition. Now, the practice of this Court, and all other Courts, is that where anything is dependent upon or regulated by a meeting duly convened, it is an essential rule or condition never to be dispensed with that the notice calling the meeting shall expressly state the object for which it is called. The 304th rule, which does not relate to composition in terms, but which points out the practice of liquidation arrangements, prescribes that the notice convening the meeting must express the object of the meeting, and the business to be transacted at it. Without deriving any sort of help from that rule, but recognising the established rule and practice in this as in all other cases where the resolution is the thing to be arrived at, I say that until due notice is given of the intention of the parties who have summoned the meeting, the resolutions are good for nothing. There is nothing in the notice I have just read to point out the object of the meeting or the business there to be transacted. It is the common form of notice which is issued in the Bankruptcy Court for summoning a meeting of creditors, and it has tacked on to it a notice to whomsoever it may concern, or to whoever may take the trouble to read it, that the *Bankruptcy Act* contains certain clauses, but there is not the slightest intimation that it was the object of the meeting to do anything under either, or both, or any part of these clauses. If it stood only upon that, the meeting was irregularly called. But it does not rest only upon that. At every step the proceedings have been wholly irregular. The creditors are summoned with no intention expressed for varying the resolution for the former composition. There had been resolutions for a composition, which were regular, perfectly valid, and binding resolutions, and which, *quâ* resolutions, might be waived or added to. But when the resolutions had been carried into effect, as they were in this case, by

the discharge of the receiver, by handing over the promissory notes for the composition, these notes became the property of the creditors receiving them, and it was not in the power of any person or of any Court to deprive them of that right. It is not varying a composition. To have any effect it would be rescinding, annulling, and cancelling those notes. Can anybody say that there is any authority to do that? These notes are out, and, for aught I know, indorsed, and they may be negotiated, as they were negotiable. Can I adopt what are called resolutions, which, if they have any effect, are to annul these promissory notes? The whole thing is, I was going to say, a mistake; but I do not think it is a mistake; I think it is a piece of ingenuity or contrivance, by which the gentleman now appealing, acting as a solicitor for this debtor, thought he could put an end to the first composition, and establish instead of it a second. He had no right to do that, and could not do it. When Mr. *De Gex* asks me whether it is a reasonable thing for a solicitor to do, and puts that as the test as to whether he is or not entitled to be paid, I say it was most unreasonable and unlawful; he had no right whatever to do it, and I am provoked to say this by the manner in which his appeal from the Court below has been brought before me. I will not go into that further, nor will I say a great deal that might be said upon this improper proceeding, a proceeding which, if it could be entertained for a moment, would lead to the most pernicious consequences; because a compounding debtor would only have to make a plausible offer to stave off his creditors for twelve months, and then make some other offer, and, for anything I know, might do it half a dozen times. That is a thing which is unlawful, and ought not to be attempted, and cannot be effectually done. If it rested only upon the exercise of the learned Judge's discretion under the 292nd rule, I should wholly decline to interfere with the exercise of that discretion; but in my opinion it does not come within the terms of that rule. It is a contrivance which ought not to be allowed to succeed, to enable a debtor, with the help of his solicitor, to do what is unjust and wrong towards his creditors, and an utter violation of the principles of the law in bankruptcy. The appeal must be dismissed with costs.

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Ex parte
HOPFER.

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ELLIOTT.

Judgment,
C. J. B.

C. A. From this decision *Hopper* appealed. The appeal was heard on
1878 the 28th of February, 1878.

Ex parte
HOPPER.

In re
ELLIOTT.

C. A.
Argument.

De Gex, Q.C., and *Finlay Knight*, for the Appellant:—

This is not a mere appeal for costs, the question being whether the costs ought to be paid out of the estate. Rule 292 applies. The receiver, who had been reappointed, had not been discharged when the adjudication was made. In *Ex parte Jeffery* (1) the creditors refused to pass any resolutions for liquidation by arrangement; here they passed resolutions to reduce the composition. This they had power to do under the 6th clause of sect. 126, and this distinguishes the case from *Ex parte Sydney* (2), in which a debtor, who was unable to carry out a composition agreed to by his creditors, himself filed a second liquidation petition. *Ex parte Radcliffe Investment Company* (3) shews that under the 6th clause of sect. 126 the majority of the creditors can bind the minority to accept a reduced composition. In proceedings for such a purpose costs must be incurred, and, if so, why should they not be paid out of the estate if the proceedings are *bonâ fide* instituted?

Winslow, Q.C., and *Creed*, for the trustee, were not heard.

Judgment, C. A. JAMES, L.J.:—

The courage of the Appellant is so great as to amount almost to audacity. There being an existing composition arrangement, which had failed owing to the default of the debtor, the solicitor, who had acted for him before, acting again on somebody's retainer, obtains leave from the Court to summon another meeting of the creditors under the guise of varying the provisions of the composition already accepted. He calls the meeting and induces the creditors to resolve to accept, in lieu of the old composition, a new composition of 3s. in the pound, payable in three instalments, for two only of which security was given. When this resolution was taken to the Registrar he refused to register it, as being absolutely an improper thing. Although it had been passed by a

(1) Law Rep. 9 Ch. 144.

(2) Law Rep. 10 Ch. 208.

(3) Law Rep. 17 Eq. 121.

large majority, the Registrar held that it was so bad, so wrong in point of law or fact, that it ought not to be registered, and the Judge of the County Court affirmed this refusal. That being so, the proceeding then came entirely to an end. The debtor was adjudicated a bankrupt, and the solicitor then applied to the Court to order the costs of the abortive proceedings to be paid out of the bankrupt's estate. The Judge held that he was not entitled to such an order. The 292nd rule says that the costs of pending proceedings for liquidation or composition shall be paid out of the estate, "unless the Court shall otherwise order." The solicitor then appealed to the Chief Judge, who dismissed the appeal, and in doing so stated several reasons, which are, in my opinion, absolutely conclusive against the appeal. I agree with every word which he used. This appeal must be dismissed with costs.

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I am entirely of the same opinion. In the first place, I think that these costs were not incurred in relation to any proceedings for or towards liquidation or composition which were pending when the bankruptcy occurred. There was an abortive attempt to reduce the amount of the composition, which had entirely failed before the bankruptcy took place. The proceedings were, therefore, not pending then. But, even if they had been, I am of opinion that the Court had, under rule 292, a discretion to refuse to allow the costs to be paid out of the estate, and the exercise of that discretion in the way of a refusal was, in my opinion, entirely justified. In *Ex parte Jeffery* (1) the creditors had declined to pass any resolution in favour of liquidation, and the next day the debtor was adjudicated a bankrupt. But the receiver, who had been appointed by the Court under the liquidation petition, continued at the time of the bankruptcy in possession of the debtor's property on behalf of all the creditors. There could be no question in that case that the liquidation proceedings were still pending when the bankruptcy occurred. The concluding words of the judgment of Lord Justice *Mellish* (2) put that beyond all doubt. He said: "As a receiver had, under the liquidation, been

(1) Law Rep. 9 Ch. 144.

(2) Law Rep. 9 Ch. 146.

C. A. appointed, and had not been discharged, the proceedings in liquidation were still pending." That distinguishes *Ex parte Jeffery* (1) from the present case.

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ELLIOTT. THESIGER, L.J.:—

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Thesiger, L.J. I am of the same opinion.

Solicitors for Appellant: *Pattison, Wigg, & Co.*

Solicitors for Trustee: *Pyke, Irving, & Pyke*, agents for *J. G. & J. E. Joel, Newcastle-on-Tyne.*

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WEST v. ORR.

[1876 W. 26.]

Will—Construction—Gift Original or Substitutional—Issue of Child dead before date of Will.

A testator gave his residuary estate to his wife for life, and after her decease to such of the children of his two late sisters as should survive his said wife and should attain twenty-one or marry, in equal shares; but in case any of such children should be dead at his (the testator's) decease, then he directed that such issue should take the share of their deceased parent:—

Held (affirming the decision of *Bacon, V.C.*), that the gift to the issue of deceased children was a substitutionary gift, and that the issue of a child who was dead at the date of the will could take nothing.

Statement.

ROBERT ORR, by his will, dated the 9th of August, 1873, after giving certain specific and pecuniary legacies, gave all the residue of his real and personal estate to his wife *Margaret Orr* and three other persons, in trust to sell and convert into money his said residuary estate, and to pay the income thereof, subject to an annuity of £200 to his niece *Mary Anne Cansh* (a daughter of his late sister *Mary*) during her life, unto his wife *Margaret Orr* during her life, and the will then proceeded as follows:—

"And after the decease of my said wife I direct that my trustees shall pay and divide the capital and income of my said residuary estate unto and equally amongst such of the children of

my late sisters, *Margaret* and *Mary*, as shall survive my said wife, and being males shall attain the age of twenty-one years, or being females shall attain that age or marry under that age. But in case any of such children shall be dead at my decease leaving lawful issue, then I direct that such issue shall take (and if more than one in equal shares as tenants in common) the share of their deceased parent."

The testator died on the 5th of January, 1874.

The testator's sister *Margaret* married *W. Mirren*, and died on the 26th of August, 1823, having had two children only who attained twenty-one or married, namely, *Elizabeth*, who married *W. Cummings*, and was still living, and *Mary*, who married *T. West*, and died on the 19th of January, 1868, before the date of the testator's will, having had eight children, of whom six were living at the death of the testator, and were all still living, two being minors.

The testator's sister *Mary Stewart* left one child, the said *Mary Anne Cansh*, who died in January, 1875.

The action was brought by *Frederick William West*, one of the infant children of *Mary West*, against the testator's widow and the other trustees of the will, for the administration of the estate. The Defendants demurred, in order to raise the question whether the Plaintiff was entitled to any share of the testator's estate under the residuary gift.

The demurrer was heard before Vice-Chancellor *Bacon* on the 24th of May, 1876.

Kay, Q.C., and *Medd*, for the demurrer :—

The gift to the children of the testator's sisters *Margaret* and *Mary* is a gift to a class. In order to qualify them as members of the class they must be alive at the date of the will and survive the widow, and must attain twenty-one or marry. Then the testator says that in case of any of "such" children being dead at his decease, their issue shall take the share of the deceased parent. The Plaintiff's mother, *Mary West*, died in 1868, and hence never could have become a member of the class, as she was dead at the date of the will.

It is most clearly settled that where there is a gift of this kind

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to the children of a member of a class, no one can possibly take under a substitutional gift unless the parent was or might possibly be one of the original class.

If the gift had been to the members of a class, "and" to the children of any member of the class, that would have been an original, not a substitutional gift. There would, in fact, have been one compound class. Moreover, here the word is "such"; and the gift is a gift of "the share of their deceased parent," *i.e.*, of the share which their deceased parent would have taken. But this daughter having been dead at the date of the will, could never have taken a share of the residuary estate.

The case is governed by *In re Hotchkiss' Trusts* (1) and *Christopherson v. Naylor* (2). Other authorities are *Butter v. Omma-ney* (3), *Habergham v. Ridehalgh* (4), and *Hunter v. Cheshire* (5).

Sir H. Jackson, Q.C., and E. P. C. Hanson, for the Plaintiff:—

If this case were within *Christopherson v. Naylor* there is a conflict of authority as to whether that case is binding or not. Vice-Chancellor Malins in *In re Potter's Trust* (6) expressly declined to follow *Christopherson v. Naylor*, and in *Adams v. Adams* (7) he adhered to his opinion, notwithstanding the remarks of Vice-Chancellor James in *In re Hotchkiss' Trusts*.

But, in truth, the case is not within *Christopherson v. Naylor*. The gift here is original, not substitutional, and that being so, *In re Hotchkiss' Trusts* is in our favour. "Such" children cannot mean children of the sisters who shall survive; it merely means children of the sisters. In other words, testator makes a gift, first, to the children of his sisters who shall survive his wife and attain twenty-one; and, secondly, to the children of any child of his sister who may be dead at his decease: *Loring v. Thomas* (8); *In re Chapman's Will* (9). Of the wide construction which the Court will put on the word "such" there are examples in *King v. Cleveland* (10); *In re Philps' Will* (11).

(1) Law Rep. 8 Eq. 643.

(2) 1 Mer. 320.

(3) 4 Russ. 73.

(4) Law Rep. 9 Eq. 395.

(5) Ibid. 8 Ch. 751.

(6) Ibid. 8 Eq. 52, 58.

(7) Law Rep. 14 Eq. 246, 250.

(8) 1 Dr. & Sm. 497.

(9) 32 Beav. 382.

(10) 26 Beav. 26, 166; 4 De G. & J. 477, 480.

(11) Law Rep. 7 Eq. 151.

The word "share" must have some meaning given to it; and the only meaning possible is that it defines what the deceased parent would have taken had he or she lived: *Bebb v. Beckwith* (1); *In re Faulding's Trusts* (2); *Giles v. Giles* (3); *Tytherleigh v. Harbin* (4).

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BACON, V.C.:—

Judgment,
V.-C. B.

What I am asked to do on behalf of the Plaintiff in this case is rather to make a will for the testator than to construe the will according to the way in which the testator has expressed himself.

I cannot give ear to the suggestion that the testator must be taken to have been acquainted with the fact of his niece's death.

I find that in August, 1873, the testator makes his will; and the present claim is made by a child of a niece who died in 1868. I have listened with the greatest interest to the many cases which have been cited, in all of which the decisions turned upon the particular words which were used, and which, it may be, are not very easy to reconcile with each other. But there are certain rules of law which must not be infringed or perverted, where it is said that the words of the will are the only guide with which a Judge is furnished, or which he is authorized to deal with. Amongst those rules is this: You cannot give a legacy to a dead man; but you may include in your gift the representatives of a person who may be deceased.

Here then we have a testator, to whom I cannot impute any knowledge that his niece, Mrs. *West*, was dead, making his will in 1873. If he had any knowledge of the fact, he has not adverted to it in any terms that I can regard. He gives his residue to a class, which at the date of his will consisted of only two persons. He says [His Lordship read the gift of residue, and continued:—] There were then in existence two persons who, he supposed, might survive his widow. They alone constituted the class from which the root of title of the persons to take under the subsequent clause must be derived. If at the time of the will there were only two persons constituting the class, and the mother of the

(1) 2 Beav. 308.

(3) 8 Sim. 360.

(2) 26 Beav. 263.

(4) 6 Sim. 329.

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Plaintiff was not one of them, how can I hold that the Plaintiff is entitled under the subsequent clause?

It is not necessary for me to consider the case of *Christopherson v. Naylor* (1). The only case to which I find it necessary to refer is *Hunter v. Cheshire* (2), which is the most recent decision of those which have been cited. Sir *Henry Jackson* seemed to think that the decision in *Hunter v. Cheshire* turned upon the meaning of the word "legatee." But the thing decided by Vice-Chancellor *Malins*, and which was affirmed by the Court of Appeal, was, that the children of a child who died before the date of the will could not take. Here I am asked to include in the subsequent bequest in this will the children of a niece of the testator, who was dead at the date of the will. In construing a clause of this kind one must first ascertain the class referred to, and that class I find to be—children of the testator's two sisters who should survive his widow and attain twenty-one. The testator says "in case any of such children"—still referring back to the children whom he had before defined—shall be dead at his decease leaving issue, such issue shall take. As I cannot find in this will any share or interest which would have been taken by the parent of this infant Plaintiff, I cannot find that the Plaintiff is entitled to any share at all under the will. In my opinion none of the cases which have been referred to, except *Hunter v. Cheshire*, have any application. The demurrer must be allowed.

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From this decision the Plaintiff appealed. The appeal was heard on the 18th of January, 1878.

Argument.

Sir *H. Jackson*, Q.C., and *Byrne*, for the Appellant:—

In addition to the cases cited before the Vice-Chancellor, they referred to *Waugh v. Waugh* (3); *Parsons v. Gulliford* (4); *Phillips v. Phillips* (5); *Martin v. Holgate* (6); *In re Sibley's Trusts* (7); *In re Smith's Trusts* (8); *Smith v. Smith* (9).

(1) 1 Mer. 320.

(2) Law Rep. 8 Ch. 751.

(3) 2 My. & K. 41.

(4) 10 Jur. (N.S.) 231.

(5) 10 Jur. (N.S.) 1173.

(6) Law Rep. 1 H. L. 175.

(7) 5 Ch. D. 494.

(8) Ibid. 497, n.

(9) 8 Sim. 353.

Kay, Q.C., and *Medd*, for the Defendants, were not called on.

JAMES, L.J.:—

In this case we are not at liberty to introduce any gift from any sort of notion as to what would have been a proper will for the testator to make, or what we may assume to have been his general intention of dividing his property equally. If the words in the will had been “among such of the children of my late sisters as shall survive me, but in case any of such children shall be dead at my decease leaving lawful issue, then I direct,” then, possibly, it might have been considered that we could have said that this was not a substitutional class. But here the words seem to me to prevent that; and taking the whole of the context without reference to the results (which after all we must do), and taking the plain meaning of the words of the will, namely, “amongst such children of my late sisters as shall survive my said wife,” it is quite impossible that in such a clause as that he could have contemplated, in the first instance, children who were already dead. And, seeing that, ordinarily speaking, the gift to a class is a gift to a class of persons living, it appears to me, putting the two sentences together, that the plain grammatical construction of the will is this—“equally amongst such of the children now living of my late sisters *Margaret* and *Mary* as shall survive my said wife; but in case any of such children”—that is, any of the children now living—“shall be dead at my decease leaving lawful issue, then I direct that such issue shall take the share of their deceased parent.” He is dealing with the class who are living at the date of his will, but who might possibly die between the date of his will and of his own death, and then the whole gift taken grammatically is consistent. What is somewhat startling is that he does leave out in the plainest possible way the issue of children dying between his death and the death of his wife, and by no possible construction could you let in the whole class of the second generation. You are bound by the express words of the will to exclude the issue of a person dying a day after the testator, because he has said so; and I think you must in like manner follow the words of the will and hold them to mean “such of the children now living as shall survive my wife; but if any of those children shall die

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C. A. in my lifetime, then I give it to their issue." I think the Vice-Chancellor's decision must be affirmed.

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BAGGALLAY, L.J.:—

Judgment, C. A.
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I agree with the Vice-Chancellor in thinking that the testator has expressed himself in intelligible language. It is possible that had we been making the will instead of the testator we might have made provision for other events than he has made provision for, but I see no difficulty in construing this will as it is.

Then, treating the portion of the will with which we have to deal as divided into two clauses, I think it is convenient to consider first what the true construction of the first clause is before we consider whether the second is by way of substitution or an original gift.

Taken *per se* I see no difficulty in construing this first clause. The testator having directed the income of his residuary estate to be paid to his wife for life, says, that upon her death the capital is to be divided equally amongst such of the children of his late sisters as shall survive his wife. Nothing is more clear than that the death of the wife is made the period at which the class taking under that clause are to be ascertained. From the very nature of the case, the persons who were to take were to be the children then living who survived his wife. The gift was only to persons living at the time when the will was made. Having provided that the children who are to be the persons to take the capital as a class when his wife dies shall be the children of his late sisters then living, is there anything unreasonable in saying, "But if any of the persons in whose favour I have made this previous gift shall die in my own lifetime, leaving issue, I substitute their issue for them"? It is perfectly clear and intelligible, leading no doubt to the capricious result that a child of a sister who survived the testator, but died before his wife, if the wife survived him, would be excluded. Still those accidental results are frequently not present to the minds of testators when they are framing their wills.

Then, having thus arrived at the true construction of the first class, the second, as I have suggested, seems to me to be perfectly clear. It is a substitutional gift in favour of the issue of any of

those children who should die in his own lifetime. I see nothing upon the face of the will—and from what appears upon the face of the will we are at liberty alone to draw any inference on this point—to shew that he contemplated no other result than his wife surviving him. No doubt in fixing the original gift he did contemplate his wife taking a first life estate, but there is nothing whatever to shew that when he was making provision for the case of any of the children dying in his own lifetime he was then limiting it to the case in which his wife should survive him. It would lead to almost a ridiculous result had that been his intention.

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But then it is suggested you are to read the second class, not as substituting the issue of a deceased child for the child who would have taken under the previous gift, but you are to treat it as a separate gift, as in fact creating together with the first class a compound class composed in part of children of his deceased sisters, and in part of the issue of children of deceased sisters. Several cases have been referred to in which there has been but one class, and from the peculiar phraseology in which that one class was described, it has been held to be a compound class, composed of children and the issue of children; but no case has been cited at all approaching that which we are now dealing with. If we were to hold it so in this case it would lead to the extraordinary result, that for the purpose of ascertaining the compound class you are to have regard to two different periods, for one portion of the class was to be composed of the children of the testator's late sisters who should be living at the death of his wife, and the other should be composed of the children of deceased sisters who should die before the testator. I find nothing whatever in this will which at all indicates that the testator contemplated that the class of beneficiaries should be ascertained at two different periods, which must be the result if that construction is adopted.

Therefore it is not necessary to consider *Christopherson v. Naylor* (1) and the variety of other cases to which reference has been made, because we have got here an element which relieves us of a great difficulty which arose in those cases, namely, the fact

(1) 1 Mer. 320.

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that the testator has in his will indicated two different periods. In *Christopherson v. Naylor* (1), and almost every other case where the question of substitution has arisen, you find only one period at which both portions of the class are to be ascertained—either the decease of the testator or the period of distribution.

It appears, therefore, to me, on a fair and reasonable construction of this will, that what the testator intended was, that those children of his deceased sisters who survived his wife should take the capital of the estate; but as regards any of those who were living at the time when he made his will, but subsequently died before his decease, there should be substitution of their issue.

Thesiger, L.J.

THESIGER, L.J. :—

I am also of opinion that the judgment of the Vice-Chancellor should be affirmed. I am far from saying that the principles of construction thus adopted are such as in this case or in the majority of cases really effectuate the intentions of the testator; but I feel strongly on the one hand the danger of speculating on the intention of testators apart from the language used by them, and on the other hand the inconveniences which arise from unsettling principles of construction which have been clearly laid down, and for a considerable time consistently followed, and I agree entirely with what Lord Justice *James*, when Vice-Chancellor, said in *In re Hotchkiss' Trusts* (2), as to the unseemliness of Courts of co-ordinate jurisdiction coming to contrary decisions in similar cases. Whatever has been said as to the decision in the case of *Christopherson v. Naylor*, that decision has been followed by a long bead-roll of authorities, subsequent in point of time, as well as prior, to the decisions of Vice-Chancellors *Stuart* and *Malins*, impugning that decision, and has been upon two, if not more, occasions cited without disapproval in the Court of Appeal in Chancery, to the position and jurisdiction of which this Court has succeeded. Under such circumstances I do not feel myself at liberty to question the principles of decision which were laid down in that case, and which form the foundation of the judgment in it.

Coming, then, to the wording of the present will, in the first

(1) 1 Mer. 320.

(2) Law Rep. 8 Eq. 643.

place, I read the words "unto and amongst such of the children of my late sisters *Margaret* and *Mary* as shall survive my said wife," as importing a class made up of children of his sisters *Margaret* and *Mary* living at the date of the will, pursuant to the recognised principle of law that in the case of a gift to a class the testator, in the absence of expressions shewing a contrary intention, must be supposed to include only living objects, the vesting of the gift in the present case being made contingent on the children surviving the wife.

In the second place, I read the words "in case any of such children shall be dead at my decease," as referring to the antecedent clause, and therefore as equivalent to the words "in case any of the children living at the date of my will shall be dead at my decease."

In the third place, it appears to me that the gift to the issue must be read as substitutional and not original, for it speaks of the issue referred to taking the share of their deceased parent, and also refers to a period differing from that which had been previously mentioned.

Finally, therefore, it follows as a consequence of the gift being substitutional and not original that only such persons can take as can shew that their parents formed part of the original class. Here the Appellant's mother was dead at the date of the will, and therefore did not form one of the original class.

Solicitors: *M. K. Braund*, agent for *J. T. Ray, Bradford, York; Maples, Teesdale, & Co.*

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FRY, J.

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Jan. 25.

BONNEWELL v. JENKINS.

[1876 B. 521.]

Contract by Letters—Acceptance—Reference to formal Contract.

The Defendant placed a leasehold property in the hands of a house agent for sale. The Plaintiff wrote to the agent, "In reference to *J.*'s property in *Fleet Street*, I think £800 for the lease, fixtures, &c., is about what I should be willing to give. Possession to be given me within fourteen days from date. This offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction." Shortly afterwards the agent wrote back, "We are instructed to accept your offer of £800 for these premises, and have asked *J.*'s solicitor to prepare contract." The required modification in the lease was procured:—

Held, by *Fry*, J., and by the Court of Appeal, that, notwithstanding the reference to a future contract, the two letters constituted a complete contract.

Rossiter v. Miller (1) distinguished.

Statement.

THIS was a purchaser's action for specific performance.

The Defendant being owner of a leasehold property, placed it in the hands of *Fox & Bousfield*, estate-agents, for sale by auction. The sale by auction did not come off, but the property remained in the hands of the estate-agents for sale.

On the 26th of February, 1876, the Plaintiff having seen an advertisement of the property, wrote to *Fox & Bousfield* as follows:—

"In reference to Mr. *Jenkins*' premises in *Fleet Street*, I have gone into the matter, and, considering that the rent was very considerably raised last year when the lease was granted, I think £800 for the lease, fixtures, fittings, &c., excluding goodwill, is about the price I should be willing to give. Possession to be given me within fourteen days from date, and all outgoings paid by vendors up to Lady Day next. This offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction, which I am informed can be done. Kindly let me hear from you as soon as possible."

Bousfield saw the Defendant, received authority from him to

(1) 5 Ch. D. 648.

accept the offer, and on the 3rd of March wrote to the Plaintiff as follows:—

“167 and 168, *Fleet Street*.

“We are instructed to accept your offer of £800 for these premises, and have asked Mr. *Jenkins*’ solicitor to prepare contract.”

No further contract was signed, but the vendor procured an alteration in the lease to the satisfaction of the purchaser’s solicitor. Disputes having arisen, the vendor ultimately refused to complete. The purchaser then commenced an action for specific performance, and the question was whether the above letters made a binding contract.

The action was heard before *Fry, J.*, on the 24th of July, 1877.

North, Q.C., and *W. Barber*, for the Plaintiff, referred to *Bailey v. Sweeting* (1); *Warner v. Willington* (2); *Crossley v. Maycock* (3).

Cookson, Q.C., and *Dauney*, for the Defendant.

North, in reply.

FRY, J.:—

It is said that the statement, “We are instructed to accept your offer of £800 for these premises,” is an acceptance only of one of several terms contained in the letter of the 26th of February. Now, in my view, the true rule for construing an instrument is to consider what the writer must have conceived that the reader would understand from it. What, then, in this case, would Mr. *Bousfield* conceive that Mr. *Bonnewell* would understand to be the effect of his letter? After having enumerated all the terms which constituted his proposal, he speaks of the whole as constituting one offer, because he says, “This offer is made subject to,” &c. Mr. *Bonnewell*’s conception, therefore, was that he had made one offer, and one offer only, and when Mr. *Bousfield* replies that he is “instructed to accept your offer of £800 for these premises,” I think he is referring to the offer made in that letter of the 26th of February, describing it by reference to its most material term,

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(1) 9 C. B. (N.S.) 843.

(2) 3 Drew. 523.

(3) Law Rep. 18 Eq. 180.

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namely, the amount of money to be paid for the premises. I think, therefore, that he intended, and must be deemed to have intended, to accept in an unqualified manner the offer contained in the letter of the 26th of February. No doubt that is followed by this statement: "We have asked Mr. *Jenkins'* solicitor to prepare contract." Now if the matter were not covered by decision, it is very probable that I should feel myself drawn to the conclusion that wherever there is a reference to a future contract the letters themselves do not constitute a contract, and for this very obvious reason, that a reference to a contract as a future thing seems to negative the notion of the existence of a contract as a present thing. But it is too late for that argument to be used before me successfully, when a long series of cases has established this proposition, that the mere reference to a future contract is not enough to negative the existence of a present one; and that principle has been very clearly expressed by the present Master of the Rolls in the case of *Crossley v. Maycock* (1), which, as far as I know, is the last case upon the subject. His Lordship there says: "The principle which governs these cases is plain. If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then until those conditions are accepted there is no final agreement such as the Court will enforce." I am, therefore, bound to inquire to which of these two categories the present acceptance belongs, and I come to the conclusion that it is a simple acceptance of the offer made by the Plaintiff, accompanied by a mere statement of an intention that that arrangement shall be reduced into a formal contract. Therefore, having regard to the authorities, I am not at liberty to come to any other conclusion than that the letters constitute a binding contract.

C. A.      The Defendant appealed. The appeal was heard on the 25th of January, 1878.

(1) Law Rep. 18 Eq. 180.

*Cookson*, Q.C., and *Dauney*, for the Appellant:—

We contend that there is in the letter of the 3rd of March no acceptance of all the terms in the letter of the 26th of February, but only an acceptance of the price. The duty of the estate agent was to find a purchaser, not to bind the vendor by an open contract; and we contend that on the true construction of the letter he did not purport to do so, and that there was to be no bargain till the final contract was signed: *Chinnock v. Marchioness of Ely* (1); *Brogden v. Metropolitan Railway Company* (2); *Honeyman v. Marryat* (3); *Crossley v. Maycock* (4); *Winn v. Bull* (5). The observations in *Rossiter v. Miller* (6) and *Ridgway v. Wharton* (7) are strongly in our favour.

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Argument.

*North*, Q.C., and *W. Barber*, for the Plaintiff, were not called upon.

JAMES, L.J.:—

Judgment, C. A.  
James, L.J.

I am clearly of opinion that the order of Mr. Justice *Fry* ought to be affirmed. Whether there is a binding contract or not depends on the construction of two letters. It is settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain. There are indeed cases, such as *Rossiter v. Miller*, where the Court may hold that the reference to the future contract is such as to shew that the parties did not intend to be bound until it was signed, but such cases depend on their own special circumstances. Here there is an unconditional acceptance by the Defendant of the Plaintiff's offer, and the reference to the preparation of a formal contract appears to me to be immaterial.

BAGGALLAY, L.J.:—

Baggallay, L.J.

The question is whether these letters constituted a binding contract. Mr. *Cookson* referred to the remarks of Lord Justice

(1) 4 D. J. &amp; S. 638.

(4) Law Rep. 18 Eq. 180.

(2) 2 App. Cas. 666.

(5) 7 Ch. D. 29.

(3) 21 Beav. 14; 6 H. L. C. 112.

(6) 5 Ch. D. 648.

(7) 6 H. L. C. 238, 268.

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*James in Rossiter v. Miller* (1). I entirely concur in those observations, but I do not think that they are applicable in the present case. If the Defendant's letter had stopped at the end of its first part, no doubt could have been entertained that there was a contract; then follows the reference to the preparation of a formal contract. The signature of such a contract may be made a condition precedent to the existence of any binding bargain, but the letter must be expressed in such a way as to shew clearly that such a condition is intended, and that is not the case here. The condition as to the modification of the lease was complied with before the end of March, and the contract then ceased to be conditional.

Thesiger, L.J. THESIGER, L.J. :—

I am entirely of the same opinion. The principle established by the authorities is, that a simple acceptance by letter of a written offer to purchase may constitute a contract to sell, although it refers to the preparation of a more formal contract. It was argued here that all that was done was to agree to the price offered, leaving the other terms of the purchase to be settled by future arrangement; but the letter does not merely refer to the price, it says, "Accept your offer of £800," *i.e.*, "Your offer by which you propose to purchase the property for £800 upon certain terms." The mere reference to the preparation of an agreement by which the terms agreed upon would be put into a more formal shape does not prevent the existence of a binding contract.

Solicitors: *J. D. Blake*; *J. B. May*.

(1) 5 Ch. D. 648.



*In re* REGENT UNITED SERVICE STORES.

*Winding-up—Service of Petition—General Order, November, 1862, r. 3—Service on Solicitor.*

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V.-C. M.

Jan. 18.

C. A.

Jan. 21.

A winding-up petition having been presented by a creditor, the solicitor of the Petitioner informed the secretary and one of the directors of the fact. The whole of the directors then met, the Petitioner's solicitor being present, and passed resolutions assenting to the appointment of their secretary as provisional liquidator without prejudice to the right of the company to assent to or dissent from the proceedings of the Petitioner, and that *C.*, the solicitor of a mortgagee of the share capital, should be instructed to take such steps as might be necessary in the interest of the company in relation to the foregoing resolution. *C.* accepted service of the petition, and appeared for the company on the motion for the appointment of an interim liquidator. The petition was not served at the office of the company. Some days after this a meeting of the company was held at which resolutions were passed that the company should be wound up voluntarily, and that *P.*, the solicitor to the company, should be instructed to carry out the negotiations as to the winding-up. There was no previous resolution appointing *P.* the solicitor. The petition came on to be heard before *Malins*, V.C., and counsel instructed by *P.* opposed on behalf of the company. A winding-up order having been made, notice of appeal was given by *P.* on behalf of the company:—

*Held*, by *Malins*, V.C., and on appeal, that as service of the petition had been accepted on behalf of the company by a solicitor duly appointed for that purpose, service at the office of the company was not necessary:

*Held*, also, by the Court of Appeal, that *P.* had no authority to represent the company on the appeal.

THE *Regent United Service Stores, Limited*, was incorporated on the 17th of November, 1874. Its registered office was in *Regent Street*, where its business was carried on. The quorum of directors was three, and at the time when the present proceedings were about to be instituted there were only three directors. Two clear days' notice of a meeting of directors was required.

On the 27th of December, 1877, a creditor presented a petition for a winding-up order. On the same day the Petitioner's solicitor, Mr. *Books*, saw the secretary and one of the directors, and informed them of the presentation of the petition, and asked whether the company would consent to the appointment of a provisional liquidator. He was informed on the following day by a letter from the secretary that the company would consent to the appointment of the secretary as provisional liquidator, and that

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notices had been sent out for a board meeting on the 29th. The meeting was accordingly held at *Bucklersbury*, where one of the directors had offices. All the directors were present. Mr. *Bilby*, the secretary, and Mr. *Coburn*, the solicitor of a mortgagee of a large part of the assets, including the share capital, were also present, and a clerk of Mr. *Rooks* attended. The following resolutions were passed and entered in the minutes:—

“That the directors agree to the appointment of Mr. *R. W. Bilby* as provisional liquidator. This resolution to be without prejudice to the rights of the company to assent to or dissent from the proceeding taken by Mr. *Rooks*.

“That Mr. *Coburn*, with the consent of Mr. *Bowerman*, be instructed to take such steps as may be necessary to the interest of the company in relation to the foregoing resolution, it being considered to the interest of the company that Mr. *Coburn* should so act, he being solicitor to the mortgagee of the share capital.”

At the same meeting Mr. *Rooks*' clerk was told to take the petition when received from the office to Mr. *Coburn*, who would accept service of it. It was accordingly taken to Mr. *Coburn* on the same day, and he accepted service of it, and undertook to appear on behalf of the company.

On the 31st of December a motion for an interim liquidator was made before Mr. Justice *Fry*. Counsel instructed by Mr. *Coburn* appeared for the company, and the order was made by consent.

On the 14th of January a meeting of the company was held, at which resolutions were passed to the effect that the company should be wound up voluntarily; that the solicitor of the company should apply to the Court to allow the petition to stand over to allow a voluntary winding-up subject to the supervision of the Court; that a meeting should be held fifteen days from that day, to confirm these resolutions; and that Mr. *Pulbrook*, the solicitor to the company, should be instructed to carry out the legal negotiations in winding up the affairs of the company. Mr. *Pulbrook* had on some previous occasions acted as solicitor to the company, but no resolution appointing him was produced.

The petition came on for hearing before Vice-Chancellor *Malins* on the 18th of January.

*Higgins*, Q.C., and *Bardswell*, for the Petitioner.

*Locock Webb*, Q.C., and *Dundas Gardiner*, *J. Pearson*, Q.C., and *Langworthy* and *Oswald*, for other parties, supported the petition.

*Glasse*, Q.C., and *Boome*, instructed by Mr. *Pulbrook* on behalf of the company, and *Brooksbank*, for a shareholders' committee of investigation, opposed.

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Argument.

No counsel instructed by Mr. *Coburn* appeared for the company.

*H. Burton Buckley*, for a bond creditor.

MALINS, V.C.:—

Judgment,  
V.-C. M.

I am sorry that any solicitor should have thought it worth his while to take the course that has been taken in opposition to this petition, a petition presented so long ago as the 27th of December last, to wind up a company which I am satisfied is in such a state of hopeless insolvency that it cannot go on with its business.

The petition is presented by Mr. *Henderson*, the holder of an acceptance of this company falling due on the 10th of September, 1877. Mr. *Henderson*, being the holder of this bill of exchange, is, I must presume, the holder of it for value, and if there were any doubt about that, the proper course would be to bring the money into Court. *Henderson*, however, being the holder of this acceptance of the company, has been unable to obtain one penny from the company. I am also satisfied, from what has taken place before me, that the landlord has distrained for his rent, and is in possession of the premises and the property upon them.

In this state of things what ought to be done? There is no valid objection raised to the petition. I have here a Petitioner who cannot obtain payment of his debt, no offer is made to pay it, and I am satisfied there are no means of paying it; no offer is made to pay the creditors who are represented by Mr. *Locock Webb*, and there is no offer, as far as I can understand, to pay the landlord his rent. What, then, is the objection? Mr. *Glasse* says he appears for the company, but I do not know that Mr. *Glasse* really does appear for the company. I have had no resolution read appointing Mr. *Pulbrook* solicitor of the company, but I have

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had a resolution read appointing Mr. *Coburn*. Now, what is the ground of objection? It is only this, that the petition was not left at the offices of the company; but is anybody ignorant of the fact that the object of presenting the petition is to obtain payment of the Petitioner's debt? The company know that they are insolvent, and what, therefore, do they want with this service? I am surprised at Mr. *Buckley*, who admits that there must be a winding-up order made, saying that a copy of the petition must be left at the offices of the company, although the necessity has been obviated by a solicitor appearing for the company when the interim order was made. What harm will be done by the order to wind up? If I were to put it off until next Friday, it is perfectly certain that I should be compelled to make the order then, because it is a matter of absolute right to all these creditors to have the company wound up. What do I care about the opposition of Mr. *Brooks-bank's* clients, who are shareholders? What right have shareholders to oppose this winding-up? If they will find money to pay the creditors, I will listen to them, but, until they do that, I cannot pay any attention whatever to their opposition.

Therefore, seeing the miserable state of insolvency which this company is in, and seeing that the petition has been duly served upon the solicitor of the company for the time being, I consider this opposition to be a mere solicitor's opposition for the purpose of seeing what business can be made out of it. As to the other topic that has been alluded to, and upon which I have been addressed again and again, that this is the fifteenth petition in my list, and has therefore come on unexpectedly, it is quite competent to me to hear any petition in my paper at such time as I may think fit. It appears to me, therefore, that this is a petition on which for the benefit of all parties I ought to make an immediate order to wind up this company compulsorily.

C. A.        The company, by Mr. *Pulbrook* as their solicitor, appealed. The appeal was heard on the 21st of January, 1878.

Argument.

*Glasse*, Q.C., and *Boome*, for the appeal:—

There was no good service, the petition not having been left at the office of the company as provided by Gen. Ord. Nov. 1862, r. 3.



It was decided under the former Act that service on the solicitor was not enough: *Re Trent Valley, &c., Railway Company* (1). The petition was irregularly heard, having been taken among the unopposed petitions.

*Higgins*, Q.C., and *Bardswell*, for the petitioning creditor:—

The petition was properly served. The rule referred to is merely directory, and when service was accepted by a solicitor appointed for the purpose at a board meeting at which all the directors were present, nothing more was requisite: *Emerson v. Brown* (2); *Giles v. Hemming* (3); *In re Panonia Leather Cloth Company* (4). Mr. *Coburn* having been duly appointed to represent the company in the matter of the winding-up, the Appellant has no *locus standi*. Mr. *Pulbrook* does not represent the company.

*Locock Webb*, Q.C., and *Dundas Gardiner*, J. *Pearson*, Q.C., and *Langworthy*, H. *Burton Buckley*, and *Brooksbank*, appeared for other parties.

*Glasse*, in reply.

BAGGALLAY, L.J.:—

The question involved in this appeal, if the appeal can be properly entertained, is as to the service of the petition. But a preliminary objection is taken by Mr. *Higgins*, on the ground that the alleged Appellant has no *locus standi*. The two subjects are so intimately mixed up with each other, that I propose to deal with them together. The petition was presented on the 27th of December, 1877. The company had its registered place of business in *Regent Street*, but occasionally, if not frequently, it met for the transaction of its general business in *Bucklersbury*, where one of the directors carried on his private business. On the second day after the day on which the petition had been presented all the directors of the company assembled together at *Bucklersbury*. There were present also Mr. *Bilby*, the secretary of the company, a gentleman of the name of *Bowerman*, who had formerly acted as solicitor of the company, and a gentleman of the name of *Coburn*, the

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(1) 3 De G. & Sm. 11.

(2) 7 Man. & G. 476.

(3) 6 Dowl. 325.

(4) 13 W. R. 1015, n.

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solicitor of the mortgagee of a large proportion of the company's assets. The meeting was further attended either by the solicitor for the petitioning creditor, or by a clerk representing that solicitor. It was stated at the meeting that it was very desirable that an interim liquidator should be appointed, and it was suggested that if no objection was raised to the appointment of an interim liquidator, the Petitioner would be willing to accept the secretary of the company as such liquidator. Thereupon a resolution was come to in the presence of all three directors (although the minutes state that one did not take part in the voting) that an interim liquidator should be appointed, and that the secretary of the company should be such interim liquidator; and instructions were given to *Coburn*, who up to that time had been the solicitor of the mortgagee, to take such steps as might be necessary in reference to the foregoing resolution.

Now, it appears to me idle to suppose that this did not mean that *Coburn* was to represent the company in the matter of the winding-up petition. No doubt the directors reserved to themselves liberty as to what course they might ultimately take with regard to the petition when brought to a hearing; but we are not now considering whether *Coburn* acted according to his duty or without sufficient authority when the petition was brought to a hearing, but whether he was sufficiently instructed on behalf of the company through the directors to represent the company. It appears to me that after that resolution it would be impossible to say that *Coburn* did not receive sufficient authority from the directors to accept the service of the petition.

There is no doubt that the 3rd rule of the General Order of November, 1862, provides for a service being made at the registered office of the company, if there be any such registered office; but that is not an imperative rule, which is never to be deviated from. I think that the general tendency of all the authorities is to shew that if there is such a service, as gives full and complete information to everybody to whom information ought to be given, it is sufficient, although provisions and rules of this kind, which are not part of the Act of Parliament, but are merely made for the purpose of carrying it into effect, may not have been literally complied with. If that be the case, and if *Coburn* was by

the resolution of the directors sufficiently appointed the solicitor of the company for the purpose of accepting service of this petition, I cannot understand upon what ground it can be alleged that any other service was necessary.

Then arises the point that Mr. *Pulbrook*, claiming to act as the solicitor of the company, gives on its behalf a notice of appeal. What authority had Mr. *Pulbrook* to represent the company? It does not appear from any resolution that Mr. *Pulbrook* was the solicitor of the company acting at the time when this petition was presented, but reliance is placed upon what took place at the meeting on the 14th of January: I think, however, that the resolution which was passed at that meeting altogether displaces the position which Mr. *Glasse* has been instructed to assume as representing the company on the present application. The resolution passed (it was a meeting of the shareholders of the company) was this: "That as it appears to this meeting that the assets of the company are sufficient to meet its liabilities, it accordingly instructs its solicitor to apply to the Court to allow the petition to stand over, and to allow a voluntary winding-up subject to the supervision of the Court."

Now, I think that if Mr. *Glasse* has any right to appear here, it would rather be as counsel for the shareholders present at that meeting, on whose behalf he made the application to the Court to allow the petition then to stand over. But upon what possible ground could it be asked that the petition should stand over? Every one of the shareholders present at that meeting had had the general information conveyed to them by the advertisement of the winding-up petition. But even if those shareholders who had attended that meeting had a *locus standi* to appear upon the petition and to oppose it, or ask that it might stand over, that would not at all affect the question of the service of the petition, which is the only question here. Certainly, if it were necessary to decide the question, I should be of opinion that Mr. *Glasse* is not duly authorized to represent the company on the present occasion; but I prefer rather to rest my decision on the ground that there appears to me to have been a full and sufficient service of the petition.

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C. A. THESIGER, L.J.:—

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I am of the same opinion. The first objection taken on behalf of the company is that the Vice-Chancellor had no jurisdiction to make this winding-up order in consequence of the provisions of rule 3 of the General Order of November, 1862, not having been complied with.

Now there have been a great number of cases decided, both at Common Law and in Chancery, in which the distinction has been recognised between provisions contained in Acts of Parliament (and the same observations would apply to rules made part of Acts of Parliament), which are merely directory, and those which are made by the Legislature an absolute condition precedent necessary to the validity of any proceedings to which those provisions refer. And I may say from my own recollection, having had occasion not more than a year ago to go rather carefully into the cases upon this point, that the tendency of the Court has been to hold provisions such as those contained in the rule to which I have referred to be merely directory, except in cases where it is further provided that in the event of their not being complied with subsequent proceedings shall be invalid.

The recent case of *Reg. v. Ingall* (1) illustrates this view. That case arose under the *Metropolis Valuation Act* of 1869, in which there are to be found a series of very distinct provisions, first as to the lodging of the valuation list and the time within which that lodging shall take place, and then as to the proceedings before the assessment committee and the time within which they shall take place. Those provisions are followed by provisions relating to appeals to special sessions and to the assessment sessions. In the case to which I refer the provision as to time had been entirely disregarded, the valuation list had not been prepared by the overseers at the proper time, and the assessment committee had not sat at the proper time. An objection was taken on appeal to the assessment sessions that the valuation list was wholly invalid in consequence of the provisions of the Act of Parliament not being complied with, and it was strongly urged in favour of that view that the effect of disregarding times mentioned in the Act of Parliament was this, that practically the Appellants, although they



had the power of appealing to the assessment sessions, had been deprived of the power which they were entitled to exercise under the Act of Parliament (although it is not often exercised) of appealing also to the special sessions, but the Court of assessment sessions held that the valuation list was good, and that the provisions, although very clear and distinct in their terms, were directory only, and that view was affirmed on appeal by the Court of Queen's Bench.

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Now, in the rule upon which the question turns, we find no words expressly invalidating the proceedings on the petition in the event of this particular provision not being complied with, and I am clearly of opinion that compliance with this rule is not an absolute condition precedent to the validity of the winding-up proceedings. That being so, I am of opinion that in the present case the Vice-Chancellor had jurisdiction. I found my view upon these reasons. The company seems to have been represented up to a certain time, and to a limited extent, by a gentleman of the name of *Pulbrook* as solicitor, subsequently a gentleman of the name of *Bowerman* was appointed, and upon this petition being presented notice was brought to the directors of the existence of the petition, and a meeting was called of the directors to consider what should be done on behalf of the company. Now, if the directors had not all been present at the meeting, it would have been questionable whether *Coburn* had authority to represent the company, since two clear days' notice of the meeting had not been given as required by the articles. The meeting was held at the office of one of the directors of the company, and it seems to me to be utterly immaterial whether previous meetings had been held there, for there is nothing in the articles of association, nothing in the statutes, nothing in the general law applicable to the subject, which prevents directors from holding their meetings at such places as they think proper. We find that a meeting of the whole body of directors is held; they pass resolutions under which they appoint Mr. *Coburn* solicitor, and it is clear to my mind that, under the resolutions so appointing him, Mr. *Coburn* had full authority to represent the company in the winding-up proceedings. Accordingly Mr. *Coburn*, when the motion for an interim liquidator was made, appeared by his counsel, and the

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company, as it seems to me, was upon that occasion duly represented. That being so, all questions as to whether the provisions of rule 3 of the Order of November, 1862, were complied with seem to me to be at an end. The Vice-Chancellor had the proper parties before him, and no objection was taken on the part of the company to his hearing the petition. The Vice-Chancellor has heard it, he has made his order upon it, and it seems to me that he had full jurisdiction to make such order.

The other objections have been dealt with by Lord Justice *Baggallay*, and I have nothing to add to what he said upon those points, except that I entirely concur with the view he has taken.

James, L.J.

JAMES, L.J. :—

Although I was not here at the beginning of this case, I have heard enough of it to justify me in saying that I most unhesitatingly concur in the decision that has been come to.

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The appeal was dismissed with costs, to be paid by Mr. *Pulbrook*.

Solicitors: *Pulbrook; Rooks & Co.; Coburn; Swan & Co.; Tilsley; Rushworth*.

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Jan. 30;  
Feb. 13.

LONDON SYNDICATE v. LORD.

[1876 L. 213.]

✓ *Practice—Payment into Court after Decree—Admission—Evidence.*

*Pulbrook*  
After a decree to take the accounts of a partnership the Chief Clerk directed that two accountants, one of whom was employed by the Plaintiff and the other by the Defendant in investigating the accounts for the purposes of the suit, should report on the accounts, shewing what items were undisputed and what were disputed, and verify their report by affidavit. The accountants verified an account shewing £541 due from the Defendant to the Plaintiff on the undisputed items, and verified also an account of disputed items. These were items of charge against the Defendant, so that, however they were decided upon, the £541 would not be reduced :—

*Held*, that the £541 ought to be ordered into Court; for that, although no certificate had been made, the fact that £541 at least was due from the

Defendant was ascertained with sufficient certainty to entitle the Plaintiff to have it ordered into Court:

*Held*, also, that under the circumstances of the present case the Defendant must be taken to have admitted by his agent that at least £541 would be found due from him.

The principles on which the Court acts in ordering payment into Court after a decree for an account, considered.

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Statement.

THE Plaintiffs, who were a limited company, and the Defendants, *Lord* and *Miller*, had carried on in partnership an agency for the sale of articles made by a company in the West of *England*. *Lord* was the acting partner, kept the books, and received the moneys. The Plaintiffs, being dissatisfied with his accounts, commenced an action in 1876 to have the partnership dissolved and the accounts taken. On the 23rd of November, 1876, upon motion for a receiver and injunction, which by consent was treated as a motion for judgment, the Defendant *Miller* undertaking to pay to the Plaintiffs any balance which might be found due to them from *Lord* on taking the accounts, and in the meantime to give personal security for such balance, the partnership was declared dissolved as from the commencement of the action; accounts were directed of the partnership property and the partnership transactions; the usual directions for the appointment of a receiver were given; and further consideration was adjourned.

The accounts being very complicated, each party employed an accountant, and ultimately the Chief Clerk referred the accounts to the two accountants, directing them to make out a balance-sheet as regarded the undisputed items, and to make out a list of disputed items, and to make an affidavit as to the result of their investigation.

The accountants made out and verified by affidavit a balance-sheet as far as regarded the items on which they were agreed, and shewed a balance of £541 due to the Plaintiffs from *Lord*. They also made out and verified by affidavit a list of the items on which they were not agreed. All these items were sums with which the Plaintiffs alleged that *Lord* ought to be charged in his accounts beyond what he had been charged with. The last item was one of £561 9s., an allowance for working expenses, retained by *Lord*. As to this the Plaintiffs alleged that, according to the construction of the partnership contract, it was only payable out of profits,

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and that on the accounts it appeared that there were no profits out of which it could be paid, and that, therefore, half that sum was payable to the Plaintiffs. The accountant employed by the Defendant deposed that the balance of £541 was subject to a question as to the computation of interest. The Plaintiffs' accountant thereupon made an affidavit, which was not contradicted, and which will be found more particularly referred to in the judgments, shewing that in no event could the calculation of interest alter the balance more than £4 16s. in favour of the Defendant *Lord*.

The Plaintiffs moved before Vice-Chancellor *Bacon* for payment into Court of £2609 7s., an amount which the Defendant admitted to be due from him subject to the recovery of an outstanding asset of about £4000. The motion was refused with costs by Vice-Chancellor *Bacon*. The Plaintiffs appealed.

Argument.

Horton Smith, Q.C., and *Oswald*, for the Appellants:—

There is upon the accounts and affidavits sufficient proof that the £541 will be coming to the Plaintiffs to entitle them to have it brought into Court: *Dunne v. English* (1); *Toulmin v. Copland* (2). The Court can enter into the question of the propriety of the item of £561 9s., and order payment into Court: *Domville v. Solly* (3).

Welby King, for *Miller*.

Locock Webb, Q.C., and *Solomon*, for *Lord*:—

We say that there is no admission of anything being due, no report finding that anything is due, and that the report of the accountants, even if it were binding—which, not having been adopted by the Court, it is not—does not find a balance due. The report of the accountants is nothing but materials to inform the mind of the Court. *Dunne v. English* is not a partnership case, and is inapplicable. *Richardson v. Bank of England* (4) shews that an admission is requisite.

[JESSEL, M.R.:—That was before decree.

(1) Law Rep. 18 Eq. 524.

(2) 3 Y. & C. Ex. 643.

(3) 2 Russ. 372.

(4) 4 My. & Cr. 165.

Horton Smith referred to *Wright v. Lukes* (1) and *Mills v. Hanson* (2).

JESSEL, M.R.:—After decree a binding report or an admission is not indispensable; it is enough if a sufficient case of probability is made out: *Creak v. Capell* (3); *Brown v. De Tastet* (4).]

At all events, as to the moiety of the £561 9s., there is no such case as the Court can act upon. It involves a question of construction.

Horton Smith was called upon to reply only as to the moiety of the £561 9s.:—

I do not rest the case as to this sum on admission, but contend that it is a case of simple calculation, such as the Court will make.

JESSEL, M.R., after shortly referring to the facts, and observing that the form of the judgment for taking the accounts and the nature of the reference to the accountants shewed that they were by arrangement between the parties, continued:—

As regards the question of interest the accountant for the Plaintiffs has put in an unanswered affidavit, shewing that the calculation of interest may be made in three ways, that if taken in the way most advantageous to the Defendant *Lord* it will result in an alteration of £4 16s. in his favour, in the second mode to £2 odd in his favour, and in the third way in a sum payable to the Plaintiffs. The question of interest, therefore, is too trifling to deserve consideration. This being so, we may consider that the accountants are entirely agreed in making out £541 due from the Defendant *Lord* to the Plaintiffs. The Defendant does not allege error in this, he only alleges that there are disputed items, and that in some way or other the account may turn out more favourable to him. But on examination of the list of disputed items it appears that if the Plaintiffs fail in their contention upon every one of them, the balance as found against Mr. *Lord* by the accountants cannot be diminished, and if the Plaintiffs succeed on any of those items it will be increased.

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(1) 13 Beav. 107.

(2) 8 Ves. 68.

(3) 6 Madd. 114.

(4) 4 Russ. 126.

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Under those circumstances, has it been sufficiently ascertained, is there a sufficient probability, that the account will result in a balance of £541 at least being found due from Mr. *Lord* to the Plaintiffs to authorize the Court to act upon that view? I think that this question should be answered in the affirmative. There is also a question whether, independently of that consideration, there has not been a sufficient admission by Mr. *Lord* to authorize the Court to make him pay that amount into Court. I think that question must be answered also in the affirmative. I will first consider the former point. According to the practice of the Court of Chancery, when it was sufficiently ascertained after decree, as Sir *John Leach* said in *Creak v. Capell* (1), that a sum of money would be due on taking the accounts, the Court had power—a discretionary power undoubtedly—to order that sum to be brought into Court as security. That was the general rule. Then how was it to be sufficiently ascertained? Sir *John Leach* gave three instances in that case, but there may be many others. Sufficiency of ascertainment cannot be ascertained positively *à priori*, nor can it be limited *à priori* to any number of particular modes of proceeding, and we have a very strong instance of that in the case of *Brown v. De Tastet* (2), to which I have already referred. No doubt the practice was well settled that a Master's report confirmed, which, though subject, under very special circumstances, to be reviewed, could not be generally reviewed, was a sufficient ground for ordering payment into Court, but when the case of *Brown v. De Tastet* came before Lord *Eldon* on exceptions he made an order which, after allowing one exception, referred it back to the Master to review the report. The report, therefore, was disapproved of instead of being approved of. Lord *Eldon* then having disapproved of the report, that is to say, of the final result of the accounts as taken by the Master, yet was of opinion, on looking at the evidence—for, as he had got rid of the report, it was only to the evidence that he could look—that it was probable that the Defendant would be found to owe more than £18,000. I think that in this case we have a great deal more than probability, but that was the result to which Lord *Eldon* came, and upon that view of the evidence he made an order for the Defendant to

(1) 6 Madd. 114.

(2) 4 Russ. 126.

pay the £18,000 into Court. After Lord *Eldon* had ceased to hold the Great Seal the matter came before Lord *Lyndhurst*, and a motion was made on the part of the Defendant that the order might be discharged as being contrary to the established practice of the Court, it being an order made upon an unconfirmed report. Now, what did Lord *Lyndhurst* do with it? Lord *Lyndhurst* refused the motion on the ground that Lord *Eldon*, though he could not confirm the report, was right in making the order upon being satisfied from the evidence that a larger balance would be found due from the Defendant, and that an order so made was not irregular.

That case is, therefore, a very high authority to establish that without a confirmed report, but after accounts have been taken, the Court may look at the result of the accounts, and, upon being satisfied that there is a probability amounting to reasonable certainty that not less than a certain amount will be found due from the Defendants, may in its discretion direct the amount to be brought into Court. But the matter came on again before Lord *Lyndhurst* on rehearing of the exceptions upon the merits, and he stated that he was unable in the present stage of the case to arrive at any safe conclusion with respect to the probable result of the accounts according to the principle on which the Master was now to proceed in taking them, and he therefore reversed so much of Lord *Eldon's* order as directed the money to be paid into Court. On this occasion he adhered to the principle of his former decision, that it is within the power and discretion of the Court to order an amount to be paid into Court by one of the accounting parties from whom it is made clear, in the opinion of the Court upon a review of the evidence, that a larger amount will be found due.

That being so on principle, I should say that now, when we no longer have a delegated Judge to take the accounts, but the Judge himself who decides the case takes the account in Chambers, with the assistance of the Chief Clerks, if the Judge finds from the evidence brought before him that a certain amount, and probably much more, will be found due from the Defendant, but that by reason of unavoidable delay in ascertaining how much will be due no certificate can be made, and no final decision as to the ultimate

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balance of the account arrived at, he has power to say, "I am satisfied now that this amount, at all events, has been sufficiently ascertained, and I will order the Defendant to pay it into Court as security." It appears to me that on principle there can be no objection to such an order. The very object of litigation is to secure the fruits of that litigation to the successful party, and nothing can more conduce to attaining that object than taking security from the person who must ultimately pay at least the amount for which security is given. Therefore, whether we look at the principle on which all practice should be founded, or whether we look at the principle to be deduced from the reported cases, I think we must arrive at the conclusion that the Court can in the fair exercise of its judicial discretion, order a sum to be paid into Court when it has been sufficiently ascertained to be due on the taking of the accounts. I labour that point more than the second, because it is one which is of general, if not of universal, application as regards the taking of accounts under judgments or decrees.

Now I come to the second, which is the narrow view. It has been held in the Court of Chancery for many years, that an admission by an accounting party of a sum being due is sufficient to ground an order upon him to pay the sum into Court. There is not, as far as I know, any virtue in one mode of admission rather than in another. What the Court has to be satisfied of is that the Defendant has admitted the amount to be due. At one time it was supposed that the admission must be in an answer, and no doubt that was the practice of the Court of Chancery before decree. It was next settled that it need not be in the answer, but that it might be in an affidavit brought in by the Defendant or in an answer to a question which he could not help answering on an examination taken by direction of the master. Whether it was a compulsory statement on oath or a voluntary statement on oath was immaterial, because it need not be upon oath at all. A man may admit by his agent or solicitor that the sum is due; he may put in a formal admission to that effect without any oath whatever, or he may act in such a manner as to authorize a third person to admit for him. He may say, "I will admit that to be due which my accountant finds to be due. I will delegate to an accountant for me

and on my behalf the right of stating the account for me, and I will admit that that is correct." There is no difficulty in doing that, and if the Court ascertains he has done it, the Court will act upon the admission. In this case it appears to me to be clear that that is the effect of what the Defendant *Lord* has done. He appoints his accountant to meet the other accountant and to settle between them what items are undisputed and what are disputed, and that is adopted by the Chief Clerk at his request. Now, that being so, what the accountant does binds him as being admittedly right. He cannot quarrel with it because it is done by his own accountant, and when we find they both agree, he cannot afterwards say that he is at liberty to dispute it for the purpose of payment into Court. It is a sufficient admission, at all events, for that purpose. I do not say it is a final admission, because even if a man has admitted in his affidavit or upon examination that a sum is due, and afterwards discovers he has made a mistake, the Court will, if he comes in due time, relieve him from the consequences of such mistake; but in the absence of something of that kind he is bound by the admission as long as it stands, and the Court is authorized to act upon it. It seems to me there is an ample admission for this purpose in the present case, and even if I had not arrived at the conclusion I have arrived at on the first point, I should think the order was right on the second, and therefore I should make the order as to the £541.

As regards the other part of the case, although I have a very strong impression as to what will ultimately result on taking the accounts, I do not think it is within either of the principles to which I have adverted. I mean the claim for the £280. This is not found by the accountants to be undisputed, but it is one of the disputed items, consequently it cannot be within the admissions by the Defendant. Nor does it appear to me to be ascertained in the sense which I have mentioned. It will probably turn out when the accounts come to be taken that there will be a loss, and it will probably turn out that on a proper construction of the articles the £560 deducted by the Defendant for expenses is not allowable. But I do not think it is the meaning of this rule that we should go into questions either of ultimate results of accounts not yet taken at all, or that we should go into questions of con-

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struction of agreements, and questions of that kind, which seem to me more proper to be discussed on some other occasion than on the occasion of payment into Court under an application such as this. I do not think it will be safe for us to extend the principles I have mentioned to a greater extent than they have gone, and therefore I think the order should be confined to that which I may call an admitted balance, viz., the £541.

Judgment,
Baggallay, L.J.

BAGGALLAY, L.J. :—

I am of the same opinion, and I have very little to add.

As regards the question of the £280, I entirely assent to what has just been said by the Master of the Rolls. As regards, also, the other sum of £541, I agree that, if a Judge who is winding up the affairs of a partnership is satisfied upon the accounts which have been taken before him that there must be at least a certain amount coming due from one of the accounting parties, it is within his jurisdiction to order that that sum shall be brought into Court; but I do not think it necessary to rest my decision in this case upon that view of the matter. If it were necessary to do so, there is, to my mind, abundant evidence before us to shew that at least the sum of £541 will be found due from Mr. *Lord*. I prefer, however, to rest my decision on the more general principle, that there has been an admission by Mr. *Lord*, in the course of taking the accounts subsequent to the decree, that the amount is due from him.

Now it has been for years the practice of the Court, and it cannot now be disputed, that not only can payment of money into Court in a partnership suit be ordered on admissions contained in the answer before decree, but that after decree it can be ordered, either upon report or upon admissions made by the party in the course of the proceedings. Now, it appears impossible to suggest a difference between an admission made by a person himself that a certain sum is due from him, and a statement that it is due made by a person to whom he has referred it, to ascertain what is due. Here the two accountants, one representing the Plaintiffs and the other representing the Defendant, make their separate investigations, and differ in the result at which they arrive. The two reports are taken before the Chief Clerk in Chambers, the parties attending before him, and then and there an order is made, which,

according to its terms, clearly must have been the result of an agreement between the parties that the two accountants should meet together and endeavour to agree upon an account, and that the account which they should so agree upon should be verified by an affidavit. Now, if the account is so taken and so verified, I cannot understand on what principle the accounting party should not be as much bound by the result of an account which has been taken according to his own agreement, as if he had himself made an admission that the sum appearing to be due by that account was actually due from him. But then it is said that no such report has been made in this case, for that the £541 was subject to a question as to interest. This, however, even in the view most favourable to the Defendant, would not lessen the amount by £5, and I agree with what the Master of the Rolls has said, that we must regard it as one of those trifling matters which this Court cannot take into account in dealing with the principle which applies on the present occasion. The Defendant, indeed, says that he does not assent to that view of the case as to the interest, and that it is merely the statement of his opponent's accountant, but it is verified by affidavit, and if the Defendant wished to dispute its accuracy, he ought to have asked for an opportunity to file an affidavit for the purpose of correcting it. He did not do so, and therefore I think we must assume the statement of the Plaintiff's accountant, that the amount of interest in any view of the case will be under £5, to be correct.

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I am of opinion, also, that as regards the sum of £541 2s. 4d. this appeal should be allowed.

We are not asked to give any final decision between the parties as to whether the sums which are the subject of the appeal are or are not due, nor to make any order that either of these sums should be paid by one party to the other. If such questions were to arise, they would have to be dealt with upon different principles, and with reference to a variety of considerations which do not in any way arise upon the present appeal. All that we are asked to do in this case is to say that a certain sum of money which it is alleged has been sufficiently for this purpose ascer-

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tained to be due from the one party to the other, shall be secured by being paid into Court.

It has been urged upon the part of the Respondent that the Court has no power to make such an order, except in two cases, first, where there has been a report finding the particular sum to be due, and, secondly, where there has been an admission by the party that that sum is due. Now, supposing that contention were well founded, I should agree with what has fallen from the Master of the Rolls, viz., that there is in the present case sufficient evidence of such an admission. It is clear, and has not been disputed in argument, that the admission need not necessarily be the admission of the party himself, and that it need not be made in any particular form or shape. Here, there being disputed items of account between the parties, and there being accountants employed by each of those parties for the express purpose of investigating those accounts, it was thought reasonable by the parties—and their view was confirmed by the Chief Clerk—that the two accountants should meet and endeavour to eliminate what was not in dispute between the parties, and make a report in the nature of a special report by referees chosen by the parties, in order to shew what, if anything, they could agree upon as being due. That being the nature of the reference, if one may use that expression, and I do not wish to be misunderstood in using it, because I rather agree with the argument that has been addressed to us, viz., that this would not be a case coming within the 42nd section of the Act of 1852; but, there being that special reference, we find in the affidavit made by the two referees a distinct admission of a sum of £541 2s. 4d. being due, subject only to a question in respect of interest to which reference is made in the accounts. Now, there is no suggestion that the affidavit of the Plaintiff's accountant to the effect that £4 16s. 5d. is the whole, under any circumstances, which could be due in respect of interest, is incorrect, and that being so, it appears to me that there is a distinct admission of the party through his authorized agent or agents of a sum due.

But I wish to go further, for it is important that the principles upon which the Courts of the Chancery Division act in cases like the present should be well settled and laid down; and, looking to

the convenience of the jurisdiction which is exercised by that Division as to payment of money into Court, I must say, speaking for myself, that I should like to see that jurisdiction applied to the same extent in the Common Law Divisions instead of being limited, as it is at present limited in those Divisions. It seems to me that this jurisdiction is founded upon wider principles than those which the Respondents admit. In the first place I entirely agree with what has fallen from the Master of the Rolls as to the decision in *Brown v. De Tastet* (1). If that case had only reported the decision of Lord *Eldon*, it would shew that he had most distinctly held that he was not confined to acting in those cases only where there had been an accepted report or an admission, but was entitled to deal with the evidence in the case. But when you look at the final decision, it is clear that Lord *Lyndhurst* was of opinion that he was in no way fettered by the fact that there was no existing Master's report, but was entitled to deal with the case upon the evidence which had been given in it, and that the only question which, under such circumstances, the Court had to deal with was whether the particular sum in respect of which the Court was asked to exercise its jurisdiction had been sufficiently ascertained as being due from one party to the other. And I would add that, looking at the reason and at the convenience of the rule, even if there had been no decisions of Lord *Eldon* and of Lord *Lyndhurst* such as were given in *Brown v. De Tastet*, I should concur with what has fallen from the Master of the Rolls, as to our being fully entitled to hold that what was there decided ought now to be decided. Here it seems to me that even if we cannot put the case so high as to say that there is a distinct admission on the part of the Defendant that this sum of £541 is due, at all events it has been sufficiently ascertained that it is due, and without giving any final decision as to whether upon the ultimate taking of the accounts any sum, or what sum, will be found to be due, at all events it is just and proper that we should order that that particular sum should be secured in Court.

For these reasons I think that the order of the Vice-Chancellor was erroneous, and that the appeal should be allowed to the

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extent of the £541 ; but as regards the sum of £280, which is the subject of the second claim of the Plaintiff, that sum has neither been reported as due, nor been admitted to be due, nor do I think that it has been so sufficiently ascertained to be due as to justify us in exercising our jurisdiction respecting it.

Solicitors: *Crook & Smith ; L. Pass.*

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Ex parte ARROWSMITH. *In re* LEVESON.

Vicar of District Church—Mortgage of Pew Rents—Validity—13 Eliz. c. 20.

A mortgage of pew rents made by the vicar of a district church is void under the Act 13 Eliz. c. 20.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, acting as Chief Judge in Bankruptcy.

The Rev. *C. A. Leveson* was the vicar of the district church of *St. George's, Campden Hill*. The site of the church was conveyed to the Ecclesiastical Commissioners on the 8th of December, 1863. The church was consecrated on the 23rd of November, 1864, and by an Order in Council made on the 18th of May, 1865, a district or consolidated chapelry was assigned to it. On the 31st of July, 1876, a scale of pew rents was approved by the Bishop of *London*. On the 19th of October, 1876, Mr. *Leveson* executed a deed by which, in consideration of £4800 advanced to him by *E. M. Arrowsmith*, he assigned to *W. J. Foster* and *T. W. Goldring*, their executors, administrators, and assigns, all and singular the pew rents from time to time during his incumbency to become payable in respect of the church, together with power, in the name of *Leveson*, his executors or administrators, or otherwise, to recover and receive and give effectual receipts for the pew rents ; to have, hold, receive and take the same upon the trusts therein declared for securing the payment to *Arrowsmith* of the £4800 and interest thereon. On the 25th of October, 1876, *Arrowsmith* entered up judgment against *Leveson* for the £4800. On the 8th of October, 1877, *Leveson* filed a liquidation petition. The creditors resolved on a liquidation by arrangement, and appointed a trustee. On the

15th of November, 1877, upon the application of the trustee, the Bishop of *London*, under sect. 88 of the *Bankruptcy Act*, 1869, issued a writ of sequestration of "all and singular the fruits, tithes, or other profits, rights, and emoluments whatsoever to the said vicarage or benefice of *St. George's, Campden Hill*, and to the aforesaid *C. H. Leveson*, the vicar or incumbent thereof, belonging or in anywise appertaining," for the benefit of the trustee. On the 14th of January, 1878, the Registrar, on the application of the trustee, declared the mortgage of the pew rents null and void as against the trustee, and restrained *Arrowsmith, Foster*, and *Goldring* from proceeding under the judgment, or commencing or prosecuting any proceedings against the trustee or the sequestrator in respect of the pew rents.

Arrowsmith, Foster, and *Goldring* appealed.

Dr. *Stephens*, Q.C., Dr. *Tristram*, and *E. C. Willis*, for the Appellants:—

The mortgage is said to be void under the Act 13 Eliz. c. 20 (1). The Act was at one time repealed, but the provision as to charging benefices was re-enacted and is still in force: *Shaw v. Pritchard* (2). But this vicarage is not a benefice within the meaning of the Act; it is a consolidated chapelry formed under the modern Church Building Acts. By the 8 & 9 Vict. c. 70, s. 13, the freehold of

(1) 13 Eliz. c. 20, is intitled "An Act touching Leases of Benefices, and other Ecclesiastical Livings with cure." And it enacts: "That the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses, be it enacted by the authority of this present Parliament that no lease after the 15th day of May next following the beginning of this Parliament, to be made of any benefice or ecclesiastical promotion, with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year, but that every such lease, so soon as it or

any part thereof shall come to any possession or use above forbidden, or immediately upon such absence, shall cease and be void; and the incumbent so offending shall for the same lose one year's profit of his said benefice, to be distributed by the ordinary among the poor of the parish; and that all chargings of such benefices with cure hereafter, with any pension, or with any profit out of the same to be yielded or taken hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this Act, shall be utterly void."

This Act was afterwards made perpetual by 3 Car. 1, c. 4.

(2) 10 B. & C. 241, 249.

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Ex parte churchwardens, and by sect. 16 of the same Act they are to collect
 ARROWSMITH. the pew rents and to pay over the balance, after providing for
In re repairs and other necessary expenses, to the minister as part of his
 LEVESON. stipend, and the right to sue for the pew rents is vested in the
 Argument. churchwardens as a *quasi* corporation. The incumbent has a mere
 equitable interest in the surplus of the pew rents. To such an
 interest the Act of *Elizabeth* does not apply. It is an interest
 created by modern Acts, and unknown when the Act of *Elizabeth*
 was passed. That Act applies only to a legal freehold interest in
 tithes or other profits of a benefice. A mortgage like that now in
 question, is not within the mischief aimed at by the statute, which
 must be construed with regard to the state of things existing when
 it was passed: *McWilliam v. Adams* (1). It is a penal and disabling
 statute, for, by 18. Eliz. c. 11 s. 7, a penalty is imposed for its breach.
 Penal and prohibitory statutes ought to be construed strictly:
Stephenson v. Higginson (2); *Phillpott v. Governors of St. George's*
Hospital (3); *Mouys v. Leake* (4). By the general law all the pews
 in a parish church are the common property of the parish: *Fuller*
v. Lane (5); *Stephens' Law of the Clergy* (6); *Wyllie v. Mott* (7);
Hawkins v. Compeigne (8). A pew rent is a voluntary payment
 for a personal privilege.

[JAMES, L.J.:—I think it resembles the payment which the
 lord of a manor receives for stallage in a market. It is a profit
 arising from the use of the freehold.]

The statute does not apply, because the parson has not a legal
 demisable interest in the pew rents. Pew rents are a voluntary
 payment, induced, no doubt, by a desire to hear the preaching of
 the parson.

[JAMES, L.J.:—All rent is in its inception a voluntary payment
 by the tenant.]

The churchwardens have only power to let the pews for a year
 at a time.

(1) 1 Macq. 120.

(2) 3 H. L. C. 638.

(3) 6 H. L. C. 338, 349, 363.

(4) 8 T. R. 411.

(5) 2 Adams, 419, 425.

(6) Vol. ii. p. 902.

(7) 1 Hag. 28, 29.

(8) 3 Phillim. 11.

Dr. *Deane*, Q.C., and *Robson*, for the trustee, were not heard.

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JAMES, L.J.:—

I have no doubt at all upon this case. The words of the Act are too plain to admit of any controversy. This consolidated chapelry, or whatever else it may be called, is, in my opinion, a “living appointed for an ecclesiastical minister.” To provide for the increased population a new church has been erected, and a new endowment of that church has been provided by means of the letting of pews, which letting of pews is by Act of Parliament placed in the hands of public officers called churchwardens, to the intent that they shall receive the rents and profits arising from them, and, after providing for necessary charges, pay the surplus to the minister, that is, to the “ecclesiastical minister” for whom that living is appointed. Therefore it appears to me quite clear that this is a case within the statute. It is said that this property is of a different kind from that which was contemplated by the statute. But, beyond all question, it is a living appointed for an ecclesiastical minister. The word “living” must mean the beneficial interest given to the minister—the beneficial interest given to a man for his maintenance. It is said that the vicar has not the legal estate, because the legal right to receive and recover the pew rents is vested in the churchwardens, and that the vicar has only a beneficial interest in the surplus. But it is as much an interest in law as any interest in a legal estate formerly known to Courts of Equity, and now known to all the Courts of this country. It is an equitable interest of exactly the same character as if it had been rent derived from glebe land, or tithes, or any other property commonly known at the time when the statute was passed. Then it is said that it is a profit derived in some degree from the personal exertions of the vicar, and therefore not within the statute. It may be that the personal exertions of the vicar are the means by which the thing is rendered valuable. But just in the same way real estate may be made more valuable because something is annexed to it, as, for instance, a public-house is made more valuable because a license is attached to it, by reason of which more profit arises from it. I cannot see any reason for saying that the right given by the churchwardens to certain persons,

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to use certain seats at certain times for the purpose of hearing a particular individual preach, is not a right to have the use and occupation of a certain portion of the freehold. If so, the sums received for those seats, and which are called rents, are profits arising out of that freehold estate by the use to which it is so put. I am of opinion that this case is within not only the plain mischief, but the plain words, of the Act, and therefore the decision of the Registrar must be affirmed.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. It is unnecessary to consider the various Acts of Parliament subsequent to 13 Eliz. c. 20, by which that statute was repealed, set up again, and again repealed, except to mention that there was a further repeal by the *Statute Law Revision Act*, 1874, No. 2 (37 & 38 Vict. c. 96), which repealed sect. 1 of 1 & 2 Vict. c. 106. The practical result of all these repeals is that the last portion of sect. 1 of 13 Eliz. c. 20, namely, that which prohibits chargings of benefices, remains now in full force, though the earlier part of the section has been repealed. What, then, is really the effect of 13 Eliz. c. 20? It prohibits “all chargings of such benefices.” That must clearly mean the chargings of the benefices which have been before mentioned, that is, “benefices or ecclesiastical promotions” with cure. Then there is prohibited “all chargings of such benefices with any pension, or with any profit out of the same.” It is quite true that pew rents were unknown before the recent time to which Dr. *Stephens* has referred. It is true that pew rents from consolidated chapelries, or vicarages, or whatever they are called, are not referred to in the Act; but I have no doubt that the pew rents of this particular church are a portion of the benefice or ecclesiastical promotion of Mr. *Leveson* within the meaning of the statute of *Elizabeth*, and that, therefore, this mortgage is a charging of the kind contemplated by the Act.

Thesiger, L.J. THESIGER, L.J.:—

I am of the same opinion. It is said that pew rents do not come within the statute of *Elizabeth*, because there is no permanent or durable interest in them; and they have been likened to an

officer's half-pay. This argument is founded, as it appears to me, upon a confusion between the rents themselves and the thing out of which they are derived. Pew rents, like any other rent, may be greater or less, or may cease altogether, and they are no doubt dependent in some measure upon the personal exertions of the particular clergyman. But, at the same time, the power of obtaining them is derived from the benefice, which in itself is permanent and durable. That being so, when the pew rents in fact exist, they are a profit derived from the benefice, and come within the meaning of the words in the statute, "any profit out of" such benefice.

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LEVESON.Judgment,
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The appeal was dismissed with costs.

Solicitor for Appellants: *W. J. Foster.*

Solicitors for Trustee: *Gadsden & Treherne.*

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[1874 M. 126.]

Will—Conversion—Enjoyment in Specie—Life Estate interposed by Codicil—Ademption—Gift of Life Interest in Life Policy—Keeping up Premiums—Bonus—Legacy, Specific or Demonstrative—Legacy, Specific or Residuary—Enumeration of Articles.

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A testator being possessed, among other things, of Egyptian Nine per Cent. Bonds, and also of a leasehold house held for lives and a policy for £3000 on one of the lives, gave several specific legacies, and, among others, specific legacies of several of his Egyptian Bonds to various legatees, and gave the leasehold house and the policy for £3000, and all bonuses and additions thereto, to *J. M.*, she paying the future premiums, and directed that if she should be married at his death, the house and policy should be settled on her and her children; and the testator gave the residue of his estate, including his household furniture, to *A. L.* After the date of his will the testator married, and by a codicil gave to his wife for her life all the income, dividends, and annual proceeds of his entire estate, and postponed the payment of all legacies and the distribution of all estates vested in him till after her death, and subject thereto confirmed his will.

Between the dates of his will and of his codicil the testator sold his Egyptian Nine per Cent. Bonds, and with the proceeds of the sale and other moneys purchased other Egyptian Bonds called Khedive Bonds.

The holder of the £3000 policy was entitled to a participation in the

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profits of the office, and had the option of taking the bonuses when declared either by reduction of the premiums or augmentation of the capital insured :—

Held, that the specific legacies of the Egyptian Bonds were adeemed, and that the Khedive Bonds formed part of the residue :

That the household furniture was not specifically given, but formed part of the residue :

That the bonuses declared by the insurance company must be added to the capital, and not taken in reduction of the premiums :

That the premiums were not payable out of the rents of the leasehold house, but must be raised as they became payable by mortgage of the policy.

Held, also (*dissentiente Baggallay, L.J.*), that the residuary estate must be converted according to the rule in *Howe v. Earl of Dartmouth* (1), and the income paid to the wife during her life :

A legacy of “500 Egyptian Nine per Cent. Bonds” *held* not to be specific, though the testator had such bonds at the time.

The decision of *Hall, V.C.*, varied.

Statement.

THIS was a suit for the administration of the estate of Lieutenant-Colonel *James Horsburgh Macdonald*, and various questions arose on the effect of his will and codicil.

The will was dated the 18th of August, 1870, and thereby the testator, who was then a widower, after appointing the Rev. *James Horsburgh, G. Thompson*, and *A. L. Irvine* his executors, and directing that his debts and testamentary expenses should be paid, gave to the said *James Horsburgh* his five shares in the *Agra Bank*, his ten shares in the *Falkland Island Company*, and all his interest, being two-thirds, in the copyright of *Horsburgh's Directory*, together with £1500 of his Egyptian Nine per Cent. Bonds absolutely. And he gave all the plate and plated ware of which he might be possessed at the time of his decease to his nephew *James Horsburgh Lane*; and gave to his nephew *Charles Clayton Lane* “£500 Egyptian Nine per Cent. Bonds” for his life, and after his decease to be equally divided between his children. And after giving various small pecuniary legacies and reciting that he had, in the events which happened, an absolute power of appointment by will over the trust estate settled by his marriage settlement, and that such estate then consisted of certain houses in *Broad Street, Bath*, held upon lease renewable on lives, on mortgage of which part of the trust estate was many years

(1) 7 Ves. 137.

since advanced, and which mortgage was afterwards foreclosed by the trustees of the said settlement, a policy of £3000 in the *Legal and General Life Assurance Company* on the life of *Charles Hensley*; a further policy on the life of the said *Charles Hensley* in the *West of England Life Insurance Company* for £250, a sum of £2000 advanced to him out of the said trust estate on mortgage of his house at *Herne Hill*, one-third share of a sum of £1833 consols subject to the life estate of his mother, and a sum of £300 New £3 per Cent. Annuities; the testator appointed as follows: "As to the said leasehold premises at *Bath*, or all such interest therein as may now be vested in the surviving trustee of the said settlement, or as I may be entitled to appoint, I give and appoint the same unto my niece *Eliza Jane Lane*; and I also give and appoint unto her the hereinbefore-mentioned policy on the life of *Charles Hensley* for £3000, with all bonuses and additions thereto, she paying the future payments in respect thereof. And I direct that if my said niece shall be single at my decease the said premiums and policy shall be transferred and vested in her absolutely for her own use and benefit; but in case she shall be married, then I direct that the same shall be settled upon her in such manner that she shall have a life estate in the income derivable therefrom inalienable by her, and which shall not be subject to her husband's debts; and that upon her decease her husband shall be entitled, if he survive, to a like life estate; and that upon the death of the survivor the trust estate shall be in trust for her children equally at twenty-one years of age, and in default of children who shall attain a vested interest, then that the trust estate shall be divisible between the persons who would have been her next of kin if she had died unmarried and intestate. And I give her in addition £500 of my said Egyptian Bonds upon the same conditions. And I direct my trustees and executors either to transfer the same to her, or to see the same settled upon the trusts aforesaid, according as she shall be single or married at my decease." The testator then appointed to his nephews *Charles Henry Lane* and *Alfred Luther Lane*, as tenants in common, his leasehold house at *Herne Hill*, and also the sum of £2000 secured thereon, so that the said house might be discharged from the said mortgage. And he directed that the said sum of £300 New £3

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per Cent. Annuities, and the said policy for £250 on the life of *C. Hensley*, and all the residue of the said settled property, should be treated as part of his residuary estate. He then disposed of his residuary estate in the following terms: "I give and appoint all the rest, residue, and remainder of my estate and effects, real and personal, and of what nature or kind soever the same may be, and wherever situate, and including the residue of the trust funds and premises under the said settlement, and my carriage, and the furniture which shall be in my house at the time of my decease, unto my said executors and trustees, and the survivors and survivor of them, upon trust, after paying and making provision for all the legacies and bequests hereinbefore given out of my personal estate, to pay such net residue to my nephew *Alfred Luther Lane* for his own use and benefit absolutely."

After the date of his will, namely, in January, 1872, the testator intermarried with his second wife, the Plaintiff, *Charlotte Macdonald*. Immediately after his marriage he executed a memorandum republishing his will, by which he gave a life interest in all his property to his wife, and subject thereto he confirmed his will. This memorandum was attested by *Alfred Luther Lane*, one of the legatees.

On the 6th of May, 1872, the testator made a codicil to his will in the following words:—

"Whereas since the date and execution of my will contained in the within five sheets of paper, I have intermarried with my present wife *Charlotte*, Now I desire to give to her, and I do hereby give and appoint to her for her life, all the income, dividends, and annual proceeds of my entire estate, and I postpone the payment of all legacies and the distribution of all estates vested in me, or over which I have any power of disposition or appointment, until after her decease. I give to my faithful servant, *Lucy Spalding*, an annuity of £30 per annum, to commence from the death of my said wife; and in all and other respects, but subject hereto, I revive and confirm my said will, and do hereby republish the same. And I do cancel the memorandum of republication written at the foot of the fifth sheet of my said will, my nephew *Alfred Luther Lane* having witnessed the same, and thereby being deprived of any interest under the said will."

The testator died ten days after the execution of his codicil, and the will and codicil were proved by the three executors named in the will.

The testator's niece, *Eliza Jane Lane*, in the month of March, 1872, married *G. Manson*.

The leasehold house at *Bath* mentioned in the will was held for a term of 99 years, if *John Hensley*, since deceased, *P. George*, since deceased, and the Rev. *Charles Hensley* should so long live, at a rent of £1 3s. 3d. This house was conveyed on the 8th of September, 1840, to the trustees of the testator's marriage settlement, by way of mortgage for securing the repayment of £3000 advanced by them out of the trust funds, and by the same indenture, the said two policies of £250, at an annual premium of £5 17s. 6d., and £3000 at an annual premium of £98 13s., on the life of *C. Hensley*, were also assigned to the said trustees as further security for the said debt.

The trustees had been for more than twenty years in adverse possession of the mortgaged premises, and for the purposes of the suit the mortgage was treated as absolutely foreclosed.

The holder of the policy of £3000 on the life of *C. Hensley* was not originally entitled to participation in the profits of the *Legal and General Life Assurance Society*, but in the year 1847 it was exchanged by the trustees for a policy, with participation in the profits, at an annual premium of £104 14s. The profits were divided every five years, and the assured were entitled to receive their share in the profits either by reduction of the premiums payable for the next five years, or by an addition to the amount insured by way of bonus. At the division of profits which took place in 1867 the testator, who was treated as the absolute owner of the policy, elected to take his share by way of reduction in the annual premium, by which the premium for the following five years was reduced to £75. But at the quinquennial division of profits, which took place in July 1872, soon after the testator's death, the executors declared no election to take a reduction of the premium, and paid the original premium of £104 15s. until the filing of the bill.

The testator at the date of his will was possessed of 2900 Egyptian Nine per Cent. Bonds, issued in 1867; but in the month

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of February, 1872, he sold these bonds, and with the proceeds of the sale and other moneys he purchased Egyptian Seven per Cent. Khedive Bonds, issued in 1870, of which he was possessed at the time of making his codicil and of his death. The Nine per Cent. Egyptian Bonds of 1867 were issued by the Egyptian Government for the purpose of purchasing the property of *Mustapha Pasha*, and the principal and interest were guaranteed by the Egyptian Government. The Seven per Cent. Khedive Bonds of 1870 were issued to meet the expense of bringing into cultivation the sugar estates of the Khedive, and were secured upon the private estates of the Khedive. Both securities were quoted as Egyptian Bonds in the *Stock Exchange* list.

The cause came on for hearing on further consideration before Vice-Chancellor *Hall* on the 6th of November, 1876, when several questions were brought before the Court, the principal of which were as follows:—

1. Whether the property comprised in the will ought to be enjoyed in specie by the Plaintiff, the testator's widow, or ought to be converted by the executors and the income of the proceeds paid to the Plaintiff during her life.

2. Whether the testator's carriage and household furniture were specifically bequeathed.

3. Whether the premiums of the policy for £3000 ought to be paid out of the rents of the leasehold property at *Bath*, or out of what other fund.

4. Whether the profits at the periods of division should be added by way of bonus to the policy money, or taken by way of reduction of the premiums.

5. In what way the policy for £250 on the life of *C. Hensley* should be dealt with.

6. Whether the Khedive Bonds passed under the gift of the Egyptian Bonds, or whether the gift of the Egyptian Bonds had been adeemed.

7. Whether the bequest of £500 Egyptian Nine per Cent. Bonds to *Charles Clayton Lane* was a general or a specific legacy.

Argument.  
—

*Dickinson*, Q.C., and *Jason Smith*, for the Plaintiff.

On the question of conversion they cited *Bothamley v. Sher-*



son (1); *Alcock v. Sloper* (2); *Collins v. Collins* (3); *Bethune v. Kennedy* (4).

*Hastings*, Q.C., and *H. Cadman Jones*, for *Alfred Luther Lane*, the residuary legatee.

*Eddis*, Q.C., and *Ware*, for *Eliza Jane Manson*, her husband and children, and *C. H. Lane*.

*Dibdin*, for *Charles Clayton Lane*.

HALL, V.C., on the first and second points, was of opinion that the leaseholds and other property specifically given by the will ought to be enjoyed specifically by the Plaintiff, but that the property comprised in the residuary gift must be converted, and the income of the proceeds paid to the Plaintiff during her life; and that the carriage and furniture were not specifically bequeathed, but were included in the general residue. On the third question his Lordship continued:—

I am of opinion, upon the true construction of the will, that the leasehold property is charged with the payment of the premiums. Two properties are given to *Eliza Jane Lane*, one being a leasehold property held for a life, and the other a policy effected on that life, and the two properties are given to her, she making the future payments in respect thereof. If she is single at the death of the testator, she is to have the property out and out. If not, the property is to be settled. I take it that these words as to the making future payments in respect thereof amount to a charge, trust, or obligation affecting the property to make that payment; and supposing she had not been single at the time of the death of the testator, her children would have had a right to say as against her, "We will have the income of the leasehold property which you take applied, in so far as it is necessary, for the purpose of making the payments." That is the proper way of putting it, and it never could have been meant that this was a mere personal obligation, and that although in one event she would have only a life interest in it, if she died her personal estate would be liable to continue

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(1) Law Rep. 20 Eq. 304.

(3) 2 My. &amp; K. 703.

(2) 2 My. &amp; K. 699.

(4) 1 My. &amp; Cr. 114.

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the payment for the benefit of her children, who would in that event be entitled to the property. If upon the whole instrument it is to be collected that the property was intended to be taken subject to the obligation, a trust or charge will be created; as to this I refer to the case of *Wright v. Wilkin* (1). I therefore think that the premiums must be paid out of the income of the leaseholds.

With respect to the fourth question, as to the bonuses, his Lordship said:—It appears to me that what has been done by the trustees is right, and that the same course ought to be pursued in future; that is, the bonuses should be added to the policy money. If there should not be enough income of the leasehold property to pay the premiums, the deficiency must be raised out of the corpus of the leaseholds, or of the policy, or both; the deficiency must not be thrown on the general estate.

With respect to the fifth question, as to the policy of £250, his Lordship held that that was part of the residue, and must be sold or surrendered.

On the sixth and seventh points his Lordship said:—It appears to me that the legacies of the testator's Egyptian stock are adeemed and not recreated by the codicil. The main object of the codicil, no doubt, was to give that effect to the will which the will would have had but for the fact of the testator's marriage, which revoked the will. The argument addressed to me is this: that the testator gives a certain thing by his will, having at that time that thing to give, and having afterwards disposed of that thing, and acquired something else which might, if he had had it at the date of his will, and had not then had the actual thing given, have been sufficient to answer and pass by the description in the will; that the effect of the codicil, by which he confirms and republishes the will, is to give something different from that which was effectually given by the will, and would have passed by it but for the fact that the testator disposed of it. I do not follow that reasoning. Where he confirms the will you must repeat it only in this sense, that you repeat the disposition in the will, giving the thing which he gave by the will and not a different thing. I cannot make the codicil pass a different thing

(1) 9 W. R. 161.

from that which was effectually disposed of by the will and would have passed by it.

With respect to the legacy of £500 Egyptian Nine per Cent. Bonds to *C. C. Lane* and his children, that is a general legacy. As everything is given to the widow for her life, the legatee must apply on her death for the value of the legacy, which must be ascertained at that time.

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From this decision, so far as regarded the declarations that the furniture and carriage formed part of the residuary estate, and that the residuary estate, including the Khedive Bonds, should be converted and the income of the proceeds paid the Plaintiff during her life, and that the premiums on the policy for £3000 should be paid out of the income of the leasehold property at *Bath*, and that the bonuses should be added to the premiums, the Plaintiff appealed. The appeal came on for hearing on the 26th of November, 1877.

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*Dickinson, Q.C., and Jason Smith, for the Appellant:—*

Argument.

It is admitted by the Respondents that the leaseholds and other parts of the testator's property specifically given by the will must be enjoyed by the widow in specie, in order that they may be preserved for the persons entitled in remainder. But the same reason applies to residuary estate, for it was clearly the intention of the testator, in framing the codicil, that everything he had should be kept in *statu quo* during his wife's life, and no distribution or conversion take place till her death. He gives the income of his "entire" estate to his wife, and "postpones the payment of all legacies and distribution of all estates" till after her death. In those words there is quite sufficient intention shewn to take the case out of the operation of the rule in *Howe v. Earl of Dartmouth* (1), *Pickering v. Pickering* (2), *Alcock v. Slopers* (3), *Collins v. Collins* (4), *Simpson v. Lester* (5), *Thursby v. Thursby* (6), *Harris v. Poyner* (7), *Holgate v. Jennings* (8). In any case the carriage and household furniture are specifically given, and not included in

(1) 7 Ves. 137.

(2) 4 My. &amp; Cr. 289.

(3) 2 My. &amp; K. 699.

(4) Ibid. 703.

(5) 4 Jur. (N.S.) 1269.

(6) Law Rep. 19 Eq. 395.

(7) 1 Drew. 174.

(8) 24 Beav. 623.

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With respect to the policy of £3000, we contend that there is no ground for charging the premiums on the rents of the leasehold estate at *Bath*, as the Vice-Chancellor has ordered. If the policy alone had been given to the wife for life, and after her death to another person, the Court would never have thought of obliging the tenant for life to keep down the premiums for the benefit of the remainderman. The result would be that the tenant for life might have to bear all the burden, and the remainderman might reap all the benefit. At the date of the will there was no connection between the leaseholds and the policy, and the testator has not shewn an intention to connect them in such a way as to make one a charge upon the other. We also say that the share of profits ought to be taken in reduction of the premiums. That was the way in which the testator elected to take it during his life, and the Court ought to presume that this was his intention in the administration of his property.

*Hastings*, Q.C., and *H. Cadman Jones*, for the residuary legatee:—

This case must come within the principle of *Howe v. Earl of Dartmouth* (3), unless a clear intention can be shewn that the residuary estate shall be enjoyed in specie. There is no such intention here. The mere fact that the payment of the residuary legatees is postponed till the death of the tenant for life is not sufficient: *Blann v. Bell* (4). Nor is the direction by the testator that the “distribution” of this estate should be postponed. That word does not imply conversion, and he merely directed what the law would have done without such direction. With respect to the carriage and furniture, the gift is not made specific merely by enumerating them: *In re Tootal's Estate* (5); and although if there had been a life estate given by the will the mention of them in the gift over might have been material, the creation of a life estate by a codicil cannot give any operation to words which were merely surplusage when they were used.

(1) 1 Ph. 75.

(2) 1 My. & Cr. 114.

(3) 7 Ves. 137.

(4) 2 D. M. & G. 775.

(5) 2 Ch. D. 628.



*Eddis*, Q.C., and *Ware*, for Mrs. *Manson* and her husband and children:—

The policy for £3000 was originally connected with the leasehold estate, being a policy on one of the lives on which the estate was held, and included with it in the mortgage security. The testator has shewn an intention that it should be still so included, for he has given them to the same persons, and has directed them both to be settled as one property on Mrs. *Manson* and her children. The Court ought, therefore, to give effect to that intention: *Darcy v. Croft* (1). In the will the testator gave the policy to Mrs. *Manson*, “she paying the future payments in respect thereof.” That constituted a charge upon the estate which was given with it: *Wright v. Wilkin* (2). And when by the codicil he interposed the Plaintiff as the first tenant for life, he meant her to take each part of his property in the same manner as the original legatees would have taken it. If the tenant for life were now dead the Court would oblige the trustees to keep up the policy for the benefit of Mrs. *Manson* and her children out of the trust estates. With respect to the bonuses, they are expressly given with the policy; and the fact that the testator during his life elected to have the premiums reduced can make no difference in the future bonuses in the face of so clear a declaration of his intention.

*Dickinson*, in reply.

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Argument.

1878. Jan. 15. BAGGALLAY, L.J.:—

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Two questions are involved in this appeal, the one whether, according to the true construction of the will and codicil of Colonel *Macdonald*, there is sufficient evidence of his intention that his wife should enjoy the income of his residuary personal estate in specie to exclude the operation of the rule commonly spoken of as the rule in *Howe v. Earl of Dartmouth* (3); the other, in what manner provision should be made for the payment of the premiums upon a certain life policy bequeathed by the testator in the

(1) 9 Ir. Ch. Rep. 19.

(2) 9 W. R. 161.

(3) 7 Ves. 137.

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manner to be presently mentioned. Upon the first of these questions I have the misfortune to differ in opinion from the other members of the Court; upon the second I believe that we are agreed.

As regards the first question, the rule as laid down by Lord Eldon in *Howe v. Earl of Dartmouth* (1), and as explained by subsequent decisions, and particularly by Lord Cottenham in *Pickering v. Pickering* (2), amounts to this, that where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognised character and are consequently deemed to be more or less hazardous.

But it must be borne in mind that the rule when acted upon is based upon an implied or presumed intention of the testator, and not upon any intention actually expressed by him, and Courts of Equity have consequently always declined to apply the rule in cases in which the testator has indicated an intention that the property should be enjoyed in specie, though he may not in a technical sense have specifically bequeathed it.

The real question, therefore, in all cases similar to that under consideration, is, whether the testator has with sufficient distinctness indicated his intention that the property should be enjoyed by his wife in specie. A great number of authorities have been cited in the course of the argument before us for the purpose of illustrating the principles upon which Courts of Equity have from time to time acted in deciding whether expressions or indications of intention, more or less distinct, have or have not been sufficient to exclude the adoption of the rule. These authorities, for the most part, turn upon the special circumstances of the particular cases under consideration, but they nevertheless, upon the whole, shew an inclination on the part of

(1) 7 Ves. 137.

(2) 4 My. &amp; Cr. 289.

successive Judges to allow small indications of intention to prevent the application of the general rule. This view was very forcibly expressed by Vice-Chancellor *Wigram* in the course of his judgment in the case of *Hinves v. Hinves* (1), in which he carefully reviewed the previous decisions, including the greater part of those to which our attention has been directed. His words were, "The Court in applying the rule has leant against conversion as strongly as is consistent with the supposition that the rule itself is well founded." A similar view was expressed by the late Master of the Rolls in the case of *Morgan v. Morgan* (2). Nor is it, in my opinion, a matter of surprise that Judges should have entertained and acted upon such views, when we call to mind the circumstances of the case in which the rule was enunciated by Lord *Eldon*, and of those to which it has been subsequently applied. The rule so enunciated had been for many years a well-recognised rule of the Court of Chancery; it was in no way questioned in the case of *Howe v. Earl of Dartmouth* (3), in which the only question was whether it was applicable to the will then under consideration. The words of the will were very simple and concise; the testator left all his personal and landed estates to his eldest sister, Lady *Anne Conolly*, for her life, and then to the eldest son of *George Byng*, Esq., and the question was whether the combination of the personal and landed estates—the devise of the latter being necessarily specific—imposed upon the personal estate such a *quasi* specific character as to exclude the operation of the rule; and Lord *Eldon* held that it did not. In *Howe v. Lord Dartmouth* the property bequeathed was but once described; the same thing was to be enjoyed by the tenant for life and by the reversioner, and by conversion alone could this be effected. If the application of the rule had been confined to cases as simple as *Howe v. Earl of Dartmouth*, the propriety of so applying it could hardly have been questioned, and one cannot but feel that by its extension the wishes and intentions of testators have been frequently defeated. But the rule is too well established to be departed from by this Court, and the sole question we have to decide is, how are we to apply it to the case now under consideration?

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(1) 3 Hare, 609, 611.

(2) 14 Beav. 72.

(3) 7 Ves. 137.

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The circumstances of the case are as follows:—Colonel *Macdonald* made his will on the 18th of August, 1870; he was then a widower and without children; he was not possessed of any real estate, but his personal estate comprised, *inter alia*, Egyptian Nine per Cent. Bonds to the nominal amount of £2900, certain shares in the *Agra Bank* and in the *Falkland Islands Company*, an interest in the copyright of *Horsburgh's Directory*, and a leasehold house and premises at *Herne Hill*, where he resided; he also had an absolute power of appointment by will over the estate which was the subject of the trusts of his marriage settlement, and which trust estate then comprised, *inter alia*, a leasehold house at *Bath* held for a term of years determinable on the death of the Rev. *Charles Hensley*, a policy on the life of the said *Charles Hensley* for the sum of £3000, and a sum of £2000 secured by a mortgage of his own property at *Herne Hill*.

The scope of this will was as follows:—The testator first directed the payment of his debts and funeral and testamentary expenses; he then gave several pecuniary legacies to the amount in the whole of between £400 and £500, and made specific bequests of his plate, books, and wearing apparel, and also of all the above enumerated articles, with the exception of the Egyptian Bonds; of these he made specific bequests to the nominal amount of £2400, and probably intended to specifically bequeath the remaining £500, but failed to use language sufficient to effect that purpose. He then bequeathed the residue of his estate in the following terms:—[His Lordship read the residuary gift set out above, and continued:—]

In the month of January, 1872, the testator intermarried with the Plaintiff. He appears to have been aware that his will was revoked by his marriage, for he shortly afterwards executed a memorandum of republication, by which he gave a life interest in all his property to the Plaintiff, and subject thereto confirmed his will.

About the end of February or the beginning of March, 1872, the testator sold his £2900 Egyptian Nine per Cent. Bonds, and with the produce of such sale and other moneys purchased £4000 Egyptian Seven per Cent. Bonds, which are referred to as “*Khedive Bonds*” in the decree from which this appeal is brought; by



reason of such sale and purchase the specific legacies, amounting to £2400 of the Nine per Cent. Bonds, were adeemed, and the property comprised in the residue was increased by the £4000 Khedive Bonds.

On the 6th of May, 1872, the day before his death, he made a codicil to his will in the following terms :—[His Lordship read the codicil].

On the 7th of May, 1872, the testator died. With the exception of the sale of the Nine per Cent. Bonds and the purchase of the Seven per Cent. Bonds, his personal estate was substantially in the same state of investment at the time of his decease as it had been at the date of the will.

It further appears that the property specifically mentioned in the will constituted the greater part, if not substantially the whole, of the property vested in himself, or over which he had absolute power of disposal by his will; the property which became subject to the residuary clause comprised, in addition to the furniture and the Khedive Bonds, a further policy for £250 on the life of the Rev. *Charles Hensley*, the third part of a sum of £1833 6s. 8d. consols, subject to the life estate therein of his mother, and a sum of £300 10s. 10d. New Three per Cents, all of which several properties formed part of the estate subject to the trusts of his marriage settlement.

On the 19th of June, 1874, the Plaintiff filed her bill in the suit, and claimed to be entitled to the income, dividends, and annual proceeds of the testator's entire personal estate, as it was invested at the time of his decease. This claim, so far as the £4000 Khedive Bonds and the furniture were concerned, was opposed by the residuary legatee, who insisted that the rule in *Howe v. Earl of Dartmouth* (1) ought to be applied. The Vice-Chancellor was of this opinion, and so held, and from his decision the present appeal is brought.

Now, if we first turn to the codicil, we find the testator referring to his marriage since the date of his will, and giving to his wife for her life all the income, dividends, and annual proceeds of his entire estate. If this had been followed by a simple gift in the same general terms of his entire estate to any person or number

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of persons, to take effect upon the decease of his wife, there could be no doubt as to the rule in *Howe v. Earl of Dartmouth* (1) being applicable; but we do not find the gift which is to take effect on the decease of his wife in so simple a form. The testator first postpones the payment of all legacies and the distribution of all estates vested in him, or over which he has any power of disposition or appointment, until after his wife's decease, and then, after giving an annuity to a servant to commence from the death of his wife, he revives, and confirms, and republishes his will, subject to the dispositions made by the codicil; in other words, all that he has by his will directed to be done on his own decease is to be postponed until after the Plaintiff's decease, and is then to be carried into effect. What, then, did he direct by his will to be done on his own decease, and how are these directions affected by the codicil? The direction in the will for the payment of his debts and funeral and testamentary expenses was unnecessary; it was what the law would require his executors to do without any such direction, and they were equally bound to discharge this duty, notwithstanding the interposition of the life estate. Again, it is quite clear, and it has been so decided by the Vice-Chancellor, that all the property specifically bequeathed by the will, with the exception of the Egyptian Bonds, the legacies of which were adeemed, is to be retained in specie during the life of the Plaintiff, and that she is entitled to receive the income of it as so retained. We come, then, to the residuary gift, and by it the residue, of whatever it may consist, is given upon trust for conversion, the trust of the proceeds of such conversion being, as expressed, that after paying and making provision for all the legacies and bequests before given, the net residue is to be paid to the residuary legatee, but the conversion is only directed for the purpose of paying or otherwise providing for the legacies, and until such legacies are to be paid or provided for, there is no necessity for such conversion, nor can the trust arise. The realizing by the trustees of the gift of the reversion appears to me to be as much a distribution of the testator's estate as the payment of any pecuniary or the delivery over of any specific legacy; and all of these dealings with the estate are, by the operation of the codicil, to be postponed

(1) 7 Ves. 137.

until after the death of the Plaintiff. Taking, then, the will and codicil as one disposition, they amount to this, that the testator gives to his wife all the income, dividends, and annual proceeds of his entire estate during her life, and directs that after her death the following distribution of his estate (that is, of the same entire estate) shall be made, namely, certain portions of it are to be paid or dealt with in accordance with the pecuniary and specific bequests mentioned in the will, and the residue is to be converted for the purpose of providing for such payment and dealing, and the net proceeds of the conversion, after satisfying such purpose, are to be paid over to the residuary legatee.

If it be the true construction of the will and codicil, and I think it is, that the conversion of the residue is by the codicil postponed until after the death of the Plaintiff, the intention of the testator would be defeated by directing it to take place at an earlier period, and the rule in *Howe v. Earl of Dartmouth* (1) ought not to be applied. If authority were necessary to support this proposition it is entirely borne out by the decisions in *Collins v. Collins* (2), which was approved of by Lord Cottenham in *Pickering v. Pickering* (3); *Bethune v. Kennedy* (4); *Daniel v. Warren* (5); *Rowe v. Rowe* (6).

I am of opinion, therefore, that the rule in *Howe v. Earl of Dartmouth* is not applicable to the present case, and that the widow is entitled to the income of the testator's estate in the state of investment in which it was at the time of his decease.

Having arrived at this conclusion upon the general construction of the will and codicil, it is unnecessary to express any decided opinion upon the argument addressed to us by the counsel for the Appellant on the use of the word "entire" in the gift to the Plaintiff; but having regard to the nature of the property at the disposal of the testator, and to the disposition of it made by him by his will, and to the circumstance that his marriage was the assigned reason for the disposition made by the codicil, I am disposed to think that the testator in giving to the Plaintiff the income, dividends, and annual proceeds of his "entire" estate

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(1) 7 Ves. 137.

(2) 2 My. &amp; K. 703.

(3) 4 My. &amp; Cr. 289.

(4) 1 My. &amp; Cr. 114.

(5) 2 Y. &amp; C. Ch. 290.

(6) 29 Beav. 276.

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meant by the use of the word "entire" to indicate that she was to have the income derived from the property as it should exist at his death; such a construction would be in accordance with the strict meaning of the word.

I think, also, that the general circumstances to which I have just alluded are strongly suggestive that the view which I have taken of the construction of the testator's will and codicil are in accordance with his real intention, though the expression of my opinion has not been based on these considerations. And here I may mention that if according to the true construction of the testator's will and codicil his widow is not entitled to enjoy the property comprised in the residuary gift in specie, this somewhat singular consequence will ensue, that whilst she is entitled to the use and occupation of the testator's residence during her life in accordance with his expressed intention, he is to be presumed to have intended that the furniture in the house in which he and she were residing at the date of his codicil, and in which he must have contemplated their residing until his decease, should be sold immediately after that event occurred. The mention of the furniture in the residuary gift would not of itself be sufficient to confer upon the gift a specific character, as was held in *In re Tootal's Estate* (1), but when taken in connection with the specific gift of the house in which it was contained, it becomes an element for consideration not wholly unimportant in the view which I take of the case.

I pass on to the second question involved; it arises in the following way:—The testator by his will gave and appointed the leasehold premises at *Bath* and the policy for £3000 upon the life of the Rev. *Charles Hensley*, both of which, as before stated, formed part of the estate subject to the trusts of his marriage settlement, to his niece the Defendant *Eliza Jane Manson*, then *Eliza Jane Lane*, spinster, and he directed that if she should be single at his decease the said leasehold premises and policy should be transferred to and vested in her absolutely for her own use and benefit, but that in case she should be married the said premises and policy should be settled upon her and her husband and children in succession, and he directed his trustees and executors to

(1) 2 Ch. D. 628.



transfer the same to her, or to see the same so settled according as his said niece might be single or married at his decease.

The policy in question had been effected with the *Legal and General Life Assurance Society* in the month of July, 1847, at an annual premium of £104 15s., and it entitled the assured to a participation in the profits of the society. It appears to have been and to be the custom of the society to divide their profits every five years, and to give the assured the option of receiving their share of profits, either by a reduction of the premiums during the next period of five years, or by an addition to the amount insured by the policy by way of bonus. A quinquennial division of profits took place shortly before the testator's death, and notice was given to the testator by the society that if he wished to exercise his option of having the premiums reduced instead of having the bonus added, he must give notice to that effect to the society. Neither the testator nor the executors gave any such notice, though on the occasions of previous divisions of profits the testator had taken his share of profits in the form of a reduction of premiums, and accordingly when the next payment of premiums became due, in July, 1872, the full premium of £104 15s. became payable in accordance with the rules of the society, and was paid, and a bonus was added to the sum assured; a similar premium has been paid in each succeeding year.

The Plaintiff, by her bill, stated that the premiums so paid since the testator's death had been paid out of the income of his estate, and she submitted that they ought not to have been paid out of any income to which she was entitled for life, or that at any rate the profits should be taken by way of reduction of premiums and not by way of additions to the sums assured. On the part of the Defendants it was contended, and the Vice-Chancellor held, that the premiums on the policy for £3000 in the *Legal and General Life Assurance Society* ought to be continued to be paid at the full rate (bonuses being added to the policy money), and that the clear rents of the leaseholds at *Bath* after payment of repairs, fire insurance, and other outgoings, were applicable to the payment so far as they would extend of such premiums, and that the premiums, so far as such rent was insufficient, were a charge on the policy money and bonuses, and that the ultimate surplus

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 ~~~~~ Judge in Chambers should direct.

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Now, it is to be observed that the bequest in the testator's will is of the policy with all bonuses and additions thereto, the legatee paying the future premiums in respect thereof; and upon these words I am disposed to think that, by whomsoever or out of whatever source the premiums are to be paid, the full amount should be paid, so that the share of profits should in all cases be added by way of bonus to the capital sum assured; but even if the words were not sufficient to make such construction beyond doubt, it appears to me that the executors were not only not called upon, but were not authorized, to exercise any option in the matter. To this extent I agree with the Vice-Chancellor, but I am unable to concur with him in thinking that the amount of the premiums were from time to time payable out of the net rents of the leasehold premises, or in any other way by the Plaintiff. I am unable to find any such direction in the will, nor anything from which any such direction could be inferred. It may be held that in preparing a proper settlement of the leasehold premises and policy pursuant to the directions in the will, provision would be made for keeping the policy on foot for the benefit of the beneficiaries under the settlement; but these directions of the testator are only to be carried out after the death of the Plaintiff. If the testator had so directed it, his directions must have been attended to, but in the absence of any such directions it would hardly be equitable to compel the Plaintiff to keep on foot a policy for the benefit of other persons. The policy however ought to be kept on foot, and as this is a suit for general administration, it can probably be arranged that the premiums shall be raised by way of charge upon the policy, so that those who will eventually become entitled to the benefit of the policy will bear the burden to the extent of their respective interests.

Thesiger, L.J. THESIGER, L.J.:—

The main question in this suit is whether, upon the true construction of the will and codicil set out in this bill of complaint, the widow of the testator is entitled to enjoy for her life, in specie,

the residuary estate bequeathed by the will, or whether such residuary estate is subject to the rule laid down in *Howe v. Earl of Dartmouth* (1), *Pickering v. Pickering* (2), and other cases, and must be converted. The Vice-Chancellor has decided in favour of conversion, and I am of opinion that he has rightly so decided. The rule itself is a simple one, founded upon the presumption, that where personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, such persons are to enjoy the same thing in succession, and effectuating the presumed intention of the testator by the conversion into investments approved by the Court of so much of the personalty as is at the death of the testator of a wasting, or perishable, or insecure nature, and also of reversionary interests. It has been said that the leaning of the Judges of the Court of Chancery in the more modern cases has been against rather than in favour of the application of the rule, and no doubt Vice-Chancellor *Wigram*, in the case of *Hinves v. Hinves* (3), takes that view, while the late Master of the Rolls, in *Morgan v. Morgan* (4), says that "the effect of the latter cases has been to allow small indications of intention to prevent the application of the rule;" but on the other hand Lord *Romilly*, when in the latter case he is dealing with the contention that the burden of proof does not lie more upon those who oppose than those who support the application of the rule, and that, being a question of construction, it is for the Court to look into the will and discover the testator's real meaning, uses the following words in the same page: "In one sense this is certainly true, but still in my opinion the rule of law is, that unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, the rule in *Howe v. Earl of Dartmouth* is to prevail. It is therefore incumbent on the persons contesting the application of that rule, and on the Court which forbids that application, to point out the words in the will which exclude it, and if this cannot be done the rule must apply." Adopting, then, the words of Lord *Romilly*, I come to the consideration whether there can be gathered from the will and codicil in the present case any expression of intention that the property in question is to be enjoyed in specie.

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(1) 7 Ves. 137.

(2) 4 My. & Cr. 289.

(3) 3 Hare, 611.

(4) 14 Beav. 72, 82.

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In almost all, if not all, the cases which have been cited in argument, where such an intention was found to exist, with the exception of *Bethune v. Kennedy* (1) (which has gone almost to the extreme length consistent with the existence of the rule at all), we find either words in their natural and literal sense importing use or enjoyment of the property in the state in which the testator left it at his death, or directions contained in the will as to the conversion of the property which were inconsistent with a conversion by the Court taking place upon the death of the testator. In the present case I find neither of those elements existing. In the first place, by the codicil the testator does not, as in *Pickering v. Pickering* (2), give to his wife "the interests, rents, dividends, annual produce, and profits, use and enjoyment of all my estate and effects whatsoever, real and personal," nor does he give her "all and every part of my property, in every shape and without any reserve, in whatever manner it is situated," which were the words of the will in *Collins v. Collins* (3), but he gives and appoints to her "all the income, dividends, and annual proceeds of my entire estate"—words which are quite consistent with the residuary estate bequeathed by the will being put into a state of investment which would secure the succession to it of the persons named as beneficiaries. In the second place, I do not find in the codicil any provision such as that contained in the will in *Alcock v. Soper* (4), where the testator devised and bequeathed all the residue of his real and personal property to his executors upon trust to permit his wife to receive the rents, profits, dividends, and annual proceeds thereof to and for her own sole use and benefit during her life, and upon her decease upon trust to sell his freehold and leasehold houses, followed by an expression of his desire that a certain named person should be employed as auctioneer, to convert the whole of his estate and effects into money, and to distribute the same in equal shares and proportions in the manner mentioned in his will. Again, I do not find any words such as those used in *Harris v. Poyner* (5), where the testator, after giving to his wife an estate for life in residuary real and personal estate, in words

(1) 1 My. & Cr. 114.

(3) 2 My. & K. 703.

(2) 4 My. & Cr. 289.

(4) Ibid. 699.

(5) 1 Drew. 174.

which in themselves rather indicated an intention that the property should remain in specie, gave the property after her death to his sons, with directions as to the transfer by the executors to him of such property, in terms some of which would have been altogether inappropriate unless applied to the transfer in specie of the leasehold property which the testator possessed and which the Vice-Chancellor held need not be converted. In the codicil in the present case the testator, no doubt, follows the gifts to his wife by the words "postpone the payment of all legacies and the distribution of all estates vested in me or over which I have any power of disposition or appointment until after her decease," but the expressions "payment of all legacies" and "distribution of all estates" seem to me to have for their *intuitus* not any question as to the management of the property or as to the securities in which it might or should be invested, but simply the postponement as regards the time of their coming into being of the interests respectively created by the will until after the death of the wife. It has, however, been urged in argument that the word "entire" used in the codicil in connection with the word "estate" affords an indication of the testator's intention that his property should remain in specie until after his wife's death; but although the word in the original language from which it is derived may have imputed to a certain extent the meaning which we should express by saying that a thing is to be "preserved in its integrity," or "kept intact," I think that here the context shews that the expression "entire estate" is used in its ordinary and popular signification of "all" or "the whole" estate as distinguished from a part only of such estate. There appears to me, therefore, to be nothing in the codicil which indicates an intention on the part of the testator that his residuary personal estate should not be converted, and when the will is read in conjunction with it I can see nothing there which should prevent the application of the rule which requires conversion. The specific mention in the residuary bequest of carriage and furniture does not constitute the bequest a specific one: *In re Tootal's Estate* (1). Nor, in my opinion, can the fact that many of the bequests in the will are specific, and require that the subject-matter of them should be left in

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specie during the existence of the life estate, lead fairly to any inference that the residuary estate is also to be left in specie during the existence of such life estate; and, finally, although if we were at liberty to speculate upon the intentions of the testator apart from what he has expressed in his will and codicil, I should be disposed to think that he very probably intended his wife to enjoy his property in the same state as that in which he left it at his decease, I cannot at the same time gather from those documents any indications that he did so intend, sufficient to override a well-established rule of construction, which, as Vice-Chancellor *Wigram* says in *Hinves v. Hinves* (1), "did not originally ascribe to testators the intention to effect such conversions," but required the conversion in order to effectuate the intentions of the particular testator that the objects of his bounty should take successive interests in one and the same thing.

Upon the questions relating to the policy for £3000, and the mode in which it should be kept up, I concur in the views expressed in the judgment of Lord Justice *Baggallay*.

James, L.J.

JAMES, L.J.:—

I also concur as to the last point in the views which have been expressed, and I do not think it is necessary to add anything.

On the other point, as to the application of the rule in *Howe v. Earl of Dartmouth* (2), I concur in the view taken by the Vice-Chancellor and the Lord Justice *Thesiger*. It is quite clear that the rule must be applied unless upon the fair construction of the will you find a sufficient indication of intention that it is not to be applied; the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case. Now, in this case, we have this peculiarity, that the will *per se* can by no possibility afford us any evidence of intention, or any indication of intention, as to how the property was to be enjoyed between the tenant for life and the person entitled to it afterwards, because there was no tenancy for life at that time in the contemplation of the testator. Then we come to the introduction of the tenancy for life by the codicil, and upon that codicil it appears to me that what was intended then was this:

(1) 3 Hare, 611.

(2) 7 Ves. 137.

The testator said, "I have made my will; since then I have married; I make my wife tenant for life of my entire estate." It appears to me the natural mode of dealing with that would have been to read the will as if it contained a gift to his wife of an estate for life in the whole of his estate. If he had simply inserted in the will as the first gift, "I give to my wife the income, dividends, and annual produce of my entire estate," I think that would not have been, according to the fair construction of the decided cases, any indication of an intention that she was to have anything more than the income, dividends, and annual produce of the whole of the estate, that is to say, of that which would remain of the estate after the debts, funeral and testamentary expenses, had been paid and the property had been converted, and properly dealt with according to the duties imposed upon his legal personal representatives. The other words, "I postpone the payment of all legacies, the distribution of all estates vested in me or over which I had a power of disposition, until after her decease," appear to me to indicate nothing more than what is implied by giving a life estate, that he means it to be paramount to any gift, however specific, however clear; that which he has given is not to be given to the legatees until after her death. It is merely amplifying the expression that there is to be an estate for life to the wife introduced into the will prior to and paramount to all the other dispositions in the will. That is the conclusion to which I have arrived, perhaps with some misgivings. But, upon the whole, I cannot satisfy myself that there is that sufficient indication which the Court ought to find before it interferes with the established rule of the Court. I therefore express my concurrence in the view taken by the Vice-Chancellor.

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Solicitors for Plaintiff: *Farmer & Robins.*

Solicitors for Defendants: *Bridges, Sawtell, & Co.; Plews & Irvine.*

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In re CHURCH AND EMPIRE FIRE INSURANCE
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ANDRESS' CASE.

*Winding-up—Companies Act, 1867, s. 25—Payment in Cash—Allotment of
fully paid-up Shares for Services.*

The proprietor of a newspaper agreed with a company to insert a series of advertisements in consideration of seventy-five fully paid-up shares in the company. Fully paid-up shares were accordingly allotted to him, but no contract was registered, as required by the *Companies Act*, 1867, s. 25. He sent the company a receipted bill and inserted the advertisements. The company was afterwards ordered to be wound up:—

Held, that, as at the time of the allotment there was no debt payable to the allottee in cash by the company, the case was not within *Spargo's Case* (1); for that the allottee could not have sustained a plea of payment in an action by the company for calls, and that he must therefore be placed on the list of contributories as a holder of shares on which nothing had been paid.

Statement.

IN 1876 the secretary of the *Church and Empire Fire Insurance Fund* sent to the proprietors of a number of provincial newspapers, including *Andress*, the proprietor of the *Brighton Times*, a circular in these terms:—

“If you are agreeable to insert the inclosed abridged prospectus in the newspaper for three months, you may do so, provided that you are willing to accept payment in fully paid-up shares of the company.”

Andress replied, “I am willing to advertise prospectus as sent for 3 months, on receipt of 75 fully paid-up £1 shares.”

Seventy-five shares were allotted to *Andress* accordingly as fully paid up, and the certificates sent him on the 7th of April, 1876. He sent back a receipt in the following form:—

“*Church and Empire Fire Insurance Fund.*

“Dr. to *W. Andress.*

“To advertisements, 13 insertions from April 8, } £75
“1876. Prospectus, &c. }

“Received by 75 fully paid-up £1 shares,

“April 8, 1876.

“*W. Andress.*”

No agreement for the remuneration of *Andress* was made, except the contract contained in the letters. No contract in writing within the 25th section of the *Companies Act*, 1867, was filed with the Registrar at or before the issue of the shares.

The company having been ordered to be wound up, the liquidator sought to put *Andress* and other persons who were in a similar position upon the list of contributories, as holders of shares on which nothing had been paid. Evidence was given on behalf of the liquidator, that it was not the custom to receive pre-payment for a continuous advertisement, and that £75 was much more than would have been asked for in cash. *Andress* deposed positively that £75 was the proper sum to be paid down in cash according to his usual scale of charges, and his evidence was corroborated by that of other persons.

Vice-Chancellor *Hall*, in a similar case, *Pagin & Gill's Case* (1), decided that shares taken in the above way must be treated as shares on which nothing had been paid. The case of *Andress* was subsequently brought before his Lordship in Chambers, and leave given to appeal direct from Chambers.

Robinson, Q.C., and *H. Lewis*, for the Appellant:—

This is within *Spargo's Case* (2).

[JESSEL, M.R.:—If I say to a newspaper proprietor, “If you will insert this advertisement for me I will give you a horse,” can that be made out to be a payment in cash?]

A receipt was given, shewing that there was a cross demand for an equal amount. There was never any contract to take anything but fully paid-up shares: *Carling's Case* (3).

Hastings, Q.C., and *E. Beaumont*, for the liquidator, were not called on.

JESSEL, M.R.:—

The argument on the part of the Appellant asks us in substance to repeal the 25th section of the *Companies Act*, 1867. The agree-

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(1) 6 Ch. D. 681.

(2) Law Rep. 8 Ch. 407.

(3) 1 Ch. D. 115.

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ment between the company and the Appellant clearly was that the company should give the Appellant seventy-five fully paid-up £1 shares for certain services to be rendered by him to the company, and in pursuance of that agreement the shares were registered in the name of the Appellant as fully paid-up shares. Then the Act steps in and says that, notwithstanding the bargain, the allottee shall be liable to pay the nominal amount of the shares. How could he at law support a plea of payment? The company never owed him any money, and never intended to owe him any. They no doubt entered into arrangements of this kind because they wanted to issue advertisements, and had no money in hand with which they could pay for them. I cannot see any pretence for saying that this was a payment in cash, or anything which would support a plea of payment at law.

Baggallay, L.J. BAGGALLAY, L.J. :—

In *Spargo's Case* the Lord Justice *James* says (1), "If it came to this, that there was a debt in money payable immediately by the company to the shareholders, and an equal debt payable immediately by the shareholders to the company, and that each was accepted in full payment of the other, the company could have pleaded payment in an action brought against them, and the shareholder could have pleaded payment in cash in a corresponding action brought by the company against him for calls. Supposing the transaction to be an honest transaction, it would in a Court of Law be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient for this Court, sitting in a winding-up matter." Here there was no debt presently payable, but the parties aimed at evading the Act of Parliament by means of a contrivance which fails.

Thesiger, L.J. THESIGER, L.J. :—

The facts here are very similar to those in *Spargo's Case*, but they just fall short of what is necessary to make the principle of that case apply. In that case there was a liability on the part of the company to pay in cash, so that a plea of payment by the

(1) Law Rep. 8 Ch. 412.

shareholder could be supported, since such a plea can be supported either by payment in cash or by an agreement to set off a cross demand payable in cash. *In re British Farmers Pure Linseed Cake Company* (1) does not help the Appellant. There shares had been issued which on their face purported to be fully paid up, and they got into the hands of *Nicolls*, an innocent transferee, who knew nothing of the circumstances under which they were issued, and the only question was whether the estoppel which would support a plea of payment between individuals would apply in the case of a company being wound up. Now, as was decided in *Pickard v. Sears* (2), where a person wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, he is estopped from averring against him a different state of things, and on that principle *Nicolls* could have supported a plea of payment. Here there is no ground for saying that such a plea could have been supported.

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ANDRESS'
CASE.Judgment,
Thesiger, L.J.

Solicitors: *W. H. Thompson ; F. Carter.*

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[1877 C. 209.]

C. A.

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Feb. 20.

Partnership—Expiration of Lease of Place of Business—Renewal of Lease.

C. and *N.* entered into partnership for twenty-one years as ironmongers under articles which provided that the business should be carried on for twenty-one years at the *G. R.* premises, or “in such other place or places as the partners may agree upon.” Afterwards the partners agreed to add to their business that of ironfounders, and took for that purpose the *G. Q.* works. The lease of these works expired during the partnership, and *C.* declined to concur in a renewed lease. *N.* thereupon took a renewed lease of them in his own name, and insisted on his right to continue to carry on the ironfounding business there on account of the partnership:—

Held, that as the partnership business could only be carried on in such place as the partners agreed upon, if they did not agree upon a place it could not be carried on at all, and that one partner, in the absence of express powers for that purpose, could not, without the consent of the other, although the partnership was to continue for a definite term, renew on account of

(1) 7 Ch. D. 533.

(2) 6 A. & E. 469.

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the partnership a lease of the property on which the business had been carried on :

Held, therefore, that *C.* was entitled to an injunction to restrain *N.* from employing the assets or pledging the credit of the partnership in carrying on business at the *G. Q.* works.

Statement

THIS was an appeal by the Plaintiff from an order of Vice-Chancellor *Hall* refusing a motion for a receiver and injunction. The point on which the decision of the Court of Appeal turned was not raised below, and the points discussed before the Vice-Chancellor were not of such a nature as to call for a report.

The Defendant *Norris, Thomas Quarm*, since deceased, and the Plaintiff, became partners in 1861 under articles of partnership dated the 23rd of February, 1861, the first clause of which provided that they would become partners "in the trade or business of ironmongers, engineers, and general contractors for ironworks, and in every other trade or business connected therewith or incidental thereto, as heretofore carried on by the said *John William Jeakes*."

The second clause provided that the partnership should continue for the term of twenty-one years, less fifty-four days, from the 22nd of February, 1861. The third article related to the name of the partnership, which was carried on under the firm of "*C. Jeakes & Co.*" The fourth article was, "That the said trade or business shall be carried on in the several premises so respectively assigned and leased to the said parties hereto as hereinbefore recited" (being leasehold premises belonging to Mr. *Jeakes*, and known as the *Great Russell Street* premises), "or in such other place or places as the said parties hereto may agree upon."

Jeakes had not carried on the business of an ironfounder, nor did the partners at first do so, but in 1863 the firm purchased a foundry business, and what took place was stated as follows by the Defendant in paragraph 9 of his statement of defence:—"In or about the month of November, 1863, the firm met with and purchased certain foundry premises at *Great Queen Street* and the business connected therewith, and the firm agreed that thenceforth the business of the partnership should not only be that of ironmongers, engineers, and general contractors for ironwork, as provided by the articles, but that also of founders." Again, in

paragraph 27, "There was an arrangement between the partners that they should add the business of founders to that of the other business of the partnership. This arrangement was not subject to be determined at the will of any partner, but formed an essential part of the partnership, and could only be altered with the consent of all the partners." This was denied by the Plaintiff, who by paragraph 14 of the statement of claim alleged that there was no agreement binding the partners to carry on the ironfounding business for any longer period than they should mutually agree upon. *Quarm* died in 1872, and the partnership went on between the Plaintiff and Defendant, the *Great Queen Street* business being carried on under the style of *Norris & Clements*.

The lease of nearly the whole of the *Great Queen Street* premises expired on the 29th of September, 1876. The Defendant wished the lease to be renewed, and the foundry business continued, but the Plaintiff, who wished the foundry business discontinued, declined to agree to any renewal. The Defendant thereupon took a renewed lease of the property in his own name, but, as he stated, on behalf and for the benefit of the firm, and he continued to carry on the *Great Queen Street* business in the name of *Norris & Clements*, and insisted on his right to do so.

The Plaintiff in 1877 commenced this action, alleging that the Defendant was carrying on the *Great Queen Street* business in the name of *Norris & Clements* for his own benefit, and also alleging breaches by the Defendant of the partnership articles, and asking for a dissolution and an account, for a receiver and manager, and for an injunction to restrain the Defendant from interfering with the business or effects of the partnership.

The Plaintiff moved for a receiver and manager, and for an injunction, and the motion having been refused by Vice-Chancellor *Hall*, the Plaintiff appealed.

Dickinson, Q.C., and *Swanston*, Q.C., for the Appellant:—

We ask for an injunction to restrain the Defendant from employing the assets and pledging the credit of the partnership in a business which does not belong to it. When the lease of the *Great Queen Street* premises had expired, the Defendant had no more right to take a new lease of that property without our

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C. A. consent than he would have had to set up the business somewhere else without our consent, and it is not pretended that the Plaintiff did consent.

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W. Pearson, Q.C., and Maidlow, contra :—

The partnership was to continue for twenty-one years, the lease of the place where the business is carried on expires, and it is not reasonable that one partner should be allowed to stop the concern by refusing to concur in any steps to take a place for carrying it on. We submit that one partner must, under such circumstances, have an implied power to renew the lease in order to give effect to the paramount intention that the business should be carried on for twenty-one years. Even the limited injunction now asked will in all probability stop the whole business of the partnership.

Judgment,
Jessel, M.R.

JESSEL, M.R. :—

This is an appeal from a decision of Vice-Chancellor *Hall*, refusing an order for a receiver and for an injunction. Having had the advantage of listening to the reading of the shorthand writer's notes of the Vice-Chancellor's judgment, I cannot help feeling that the point on which I am about to express an opinion was not considered by his Lordship, and therefore, in differing from him as to the result, I am not really differing from any portion of the judgment he delivered.

The action by the Plaintiff, who is a partner with the Defendant, seeks a dissolution of the partnership, with an injunction and receiver generally, but it also has a special ground of injunction relating to a portion of the business carried on in *Great Queen Street*. [His Lordship then, after stating the facts of the case to the same effect as above, and saying that he would assume the above allegations in the statement of defence to be correct, continued :—]

The Defendant, without the assent of the Plaintiff, chose to take a renewal in his own name of the lease of the *Great Queen Street* premises, for the purposes, as he says, of the partnership, and he insists upon his right of carrying on in the *Great Queen Street* premises, under the renewed lease, the foundry business in the name and in behalf of the partnership. The question raised by

this appeal is whether he has any such right, and I think he has not. In the first place, supposing there were no partnership articles at all, is there any implied authority given by law to one partner enabling him to take property on lease for the purpose of carrying on a portion of the partnership business? No authority has been cited, nor am I aware of any, in support of the affirmative. The partnership business, consisting as it does here of several businesses, may cease to be carried on in part because the partners cannot agree upon the selection of a new place to carry it on, but I know of no way in which we can impose on the other partner or partners the obligation of allowing it to be carried on at the place any one partner might choose because the other partner or partners could not agree with him in selecting a place. It is a mere question of contract. There is not, in my opinion, any foundation for the argument that the stipulation as to the time during which the business is to be carried on is paramount to the stipulations as to the place of carrying it on, or as to the nature of the business. They are all matters of contract, and if the contract is imperfect, leaving certain essential matters to be subsequently decided by the agreement of the partners, I am not aware of any authority in a Court of Justice to decide for them. They must be left to decide for themselves, and if they cannot agree the contract fails, as any contract which is indeterminate upon any essential points must fail if the parties cannot come to the subsidiary agreement which is necessary to give full effect to it. The essence of partnership is mutual agreement and consent, and to ask a Court of Justice to say that a certain place is a reasonable place for carrying on the business, and that it is taken upon reasonable terms having regard to the nature of the business, appears to me to be an attempt to impose upon Judges functions which they are not competent to exercise. How can a Judge decide what is a proper place for carrying on a particular business? How can he say that the rent is a fair one so as to afford a profit or a reasonable prospect of a profit in carrying it on? How is he to acquire the knowledge? Is it reasonable that it should be submitted to a Judge or a jury, upon the conflicting opinions of experts, whether a place at *Millwall* or *Bankside* is a proper place, or whether the rent asked is a reasonable rent with reference to the nature of the property *per se*, or

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whether it is reasonable with regard to the nature of the business to be there carried on? It is quite obvious that these things are not within the purview of Courts of Justice; they are intended by the parties to be matters of agreement, and matters of agreement they must remain. Thus far I have dealt with the law apart from any articles of partnership, but in this particular instance we have a clause which says that the business of the firm is to be carried on upon the particular premises mentioned in the articles, "or in such other place or places as the said parties hereto may agree upon." Now, if we add the business of ironfounders to the other four businesses, still the parties may agree upon the place, and when they have agreed upon the place, if the term for which that place is held runs out there must be a new agreement for a new place or for taking a renewed lease of the old place. Therefore, as it appears to me, we should be making a new contract for the parties if we said that one of the partners without the assent of the other could renew this lease upon such terms as he thought reasonable, and carry on the trade there in spite of the other partner. That being so, my opinion is that the Plaintiff was entitled to an injunction restraining the Defendant from employing any part of the partnership assets, and from pledging the credit of the partnership in or for the purpose of carrying on the foundry business in *Great Queen Street* in the pleadings mentioned, or in paying any of the liabilities thereof which accrued from the 29th of September, 1876, the date of the expiration of the lease. If the Defendant decides, on consideration, that the result of that injunction will be to prevent his carrying on the remainder of the partnership business, then of course the right order to substitute for this order will be an order for the appointment of a general receiver, but if he does not so think, the order will be for an injunction such as I have stated.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion, and have nothing to add to what the Master of the Rolls has said as regards the general merits of the case. I should have been glad, if I could have seen my way to it, to have concurred in appointing a receiver and manager either as to the whole or as to a portion of this business, because I think

that such appointment would be for the advantage of both parties during the time which must elapse before the questions between them can be decided, but I do not see my way to our doing so except by consent. I think, however, there can be no question as regards the propriety of granting the injunction to the extent which the Master of the Rolls has mentioned. If it has the effect, as suggested by Mr. *Pearson*, of paralysing the whole concern, it will be, I am sure, to the interest of both parties to arrange to take a decree for dissolution and winding-up of the affairs; but that is matter for their consideration and not for ours.

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THESIGER, L.J.:—

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I am of the same opinion. It was competent for the parties, if they had been so minded, to have agreed not only that the foundry business should be carried on for the whole period of twenty-one years, but also, in order to effect that object, that one partner should have authority in the name of the partnership to obtain a renewal of the lease of the premises on which such business was originally carried on; but the parties in the present case have not so agreed. The statement of defence does not allege that they did so agree, and the conduct of the Defendant in taking the renewed lease in his own name is entirely inconsistent with their having done so.

That being so, the Court has no power to imply an agreement to the effect referred to. The terms upon which partnership premises are taken form a most important element in partnership arrangements, and must be left to the contract of the parties; and while that is true as a general proposition of law, in the present case we find that the parties themselves have by article 4 of their agreement made a distinct stipulation upon the point. My only doubt on the matter, if doubt it can be called, has been whether the Court ought to interfere by injunction upon a ground which is not the substantial ground put forward in the Plaintiff's statement of claim; but that doubt is removed by the consideration that in the present case the larger ground upon which the Plaintiff's claim is rested includes the smaller, in other words, that the objection to continue the foundry business at all includes the objection to carry it on in *Great Queen Street*; and the facts set out

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in the statement of claim are therefore sufficient to raise, and do raise and connect, both the objections to which I have referred.

For these reasons, I also think that the appeal should be allowed.

Solicitors: *Scott, Jarman & Trass; Chamberlain.*

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HATFEILD v. MINET.

[1875 H. 74.]

Advancement to Children—Statute of Distributions (22 & 23 Car. 2, c. 10), s. 5
—*Annuity granted in Intestate's Lifetime.*

By a deed of separation the husband covenanted to pay an annuity of £200 to each of his daughters during their respective lives, such annuities to cease if he should again cohabit with his wife, which event did not happen. The husband survived his wife and died intestate. In the distribution of his personal estate among his children under the *Statute of Distributions* :—

Held (reversing the decision of *Hall*, V.C.), that so much of the annuities to the daughters as were paid during their father's lifetime were not in the nature of advancements; and that the value of each annuity must be estimated as at the death of the intestate, and the amount brought into hotchpot.

Statement.

THIS was an action for the administration of the estate of *Charles William Minet*, an intestate.

By an indenture dated the 19th of October, 1860 (being a deed of separation between *C. W. Minet* and *Leah* his wife), *C. W. Minet* covenanted with two trustees to pay to each of his six daughters, *Fanny*, *Susan*, *Gertrude*, *Geraldine*, *Georgina*, and *Delia*, during their respective lives, an annuity of £200, but subject to a proviso in the said indenture contained, that if the said *C. W. Minet* should at any time thereafter by deed or will settle any lands or hereditaments, or any moneys or other personalty, upon any of his said daughters, the annual income for the time being received by any such daughter by virtue of any such deed or will should be taken and received by such daughter in discharge *pro tanto* of her annuity: And it was also declared that during the respective minorities of the daughters who were then under age the annuities should be paid to *Leah Minet*, the wife of the said

C. W. Minet, for their maintenance and education: Provided always that in case the said *C. W. Minet* and *Leah Minet* should at any time thereafter, with their mutual consent, come together and cohabit as man and wife, then and from thenceforth the said annuities should cease.

Fanny Minet married *R. T. N. Tubbs*, and by her marriage settlement, dated the 10th of September, 1861, she assigned her annuity of £200 to the trustees of the settlement.

Susan Minet married *Sir C. W. D. Staveley*, and by her marriage settlement, dated the 29th of October, 1864, her father, *C. W. Minet*, covenanted for the immediate payment to the trustees of the settlement of the sum of £5000; but it was provided that the covenant should not be put in force during the lifetime of *C. W. Minet*, or until six months after his death if he in the meantime paid to the trustees interest on the said sum of £5000 at the rate of £4 per cent.

Delia Minet married *O. G. Parker*, and on her marriage *C. W. Minet*, by deed-poll, dated the 16th of October, 1871, appointed the sum of £6100 *India 4 per Cent.* Stock to be held in trust for his said daughter *Delia*, and by the same deed he released to her his life interest in the same sum of stock, and covenanted to pay to the trustees an annuity of £60 during the joint lives of himself and his daughter. By an indenture of even date *Delia Minet*, with the privity of her intended husband, released her father from the said annuity of £200.

Gertrude Minet married *T. G. Hatfeild*, and on her marriage *C. W. Minet*, by deed-poll, dated the 30th of January, 1872, appointed a like sum of £6100 *India 4 per Cent.* Stock to his said daughter *Gertrude*, and by the same deed released to her his life interest in the same sum of stock. By an indenture of even date *Gertrude Minet* released her father from the said annuity of £200.

Gertrude Hatfeild died in November, 1872, leaving one child, the Plaintiff *Gertrude Hatfeild*, who was an infant.

Georgina Minet married *H. B. Patton*, and assigned her annuity to the trustees of her marriage settlement.

Mrs. *Minet* died in 1871 without having returned to live with her husband.

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C. W. Minet died intestate on the 27th of February, 1874. His daughter *Geraldine Minet*, who was unmarried, took out administration to his estate. The action was brought against her for the administration of the estate, and the Plaintiff prayed that in the distribution the advances made by the intestate to his children in his lifetime might be brought into account. The principal question when the action came on for trial related to the manner in which these advances should be calculated.

The case was heard before Vice-Chancellor *Hall* on the 13th of June, 1877.

Argument.

Hastings, Q.C., and *Armstrong*, for the Plaintiff and Mr. and Mrs. *Parker* and their trustees:—

The correct principle for ascertaining the value of the annuities is to take the actual payments ascertained to have been made, which will give the value as to those who died in the lifetime of the settlor, and to add to that, in the case of those who survived the settlor, the value of an annuity from his death, calculated according to the Succession Duty Tables. Then as to the two who released their annuities, namely, Mrs. *Hatfeild*, the Plaintiff's mother, and Mrs. *Parker*, that must be taken as a re-purchase, and the value of the annuity at the time of the re-purchase must be deducted from the value at the time of the grant, and the advancement would be the difference between those two values. It must be borne in mind that these were not advancements in the ordinary sense of the word, as the father had only a power of appointment over a fund in which he had a life interest, so that it was only an advance so far as it was a surrender of his life interest; the Chief Clerk has so treated it, and it is the correct view, and the view most favourable to the infant Plaintiff.

Kekewich, Q.C., and *John Henderson*, for Miss *Minet* and Lady *Staveley*:—

The proper course is to value the annuities at the time of their grant, that is, at the date of the separation deed of the 19th of October, 1860. There appears to be only one authority reported upon the point: *Kircudbright v. Kircudbright* (1). That was a

case of a peculiar nature, in which a father had given a bond to secure an annuity to his son until the son should be in possession of a living of a certain value, and the son entered into a counter-agreement that he would forthwith enter holy orders and accept the living. The son received the annuity for nine years, but had not complied with the condition; and the father having died, Lord *Eldon*, while doubting the validity of the bond, decided, on the ground of non-compliance by the son, that the annuity was determinable by the father or his representatives, and that, payments having been made in respect of it, the annuity was an advancement to be brought into hotchpot, “viz., the value at the date of the grant, or if it has ceased, the payments received, at the option of the child.” That is a decision that, whatever may be the difficulty in valuing the contingencies, yet the annuity must be valued at the date of the grant (valuing the contingency as best you can), except in the one case where the annuity has ceased, and then the child is to have the option. Here there are three annuities subsisting, and one, that of Mrs. *Hatfeild*, has determined, so that no option can be exercised as to it; the fairest way, therefore, seems to be to treat all the annuities on the same footing, and to value them all at the date of the grant. In *Wroughton v. Colquhoun* (1), where a testator’s assets were insufficient to satisfy an annuity and the pecuniary legacies given by the will, it was held that the annuity ought to be valued, and that the annuitant was entitled at once to the amount of the valuation, subject to an abatement in proportion to that on the pecuniary legacies. It must be borne in mind that the payments made by the testator in respect of these annuities were not by way of advancement, but in discharge of a legal liability.

Dickinson, Q.C., and *W. Barber*, for Mr. and Mrs. *Tubbs*, and Mr. and Mrs. *Patton*’s settlement trustees, and Miss *Minet*, supported the same contention, and referred to *Boyd v. Boyd* (2) and *Williams on Executors* (3).

Hastings, in reply :—

The object should be as far as possible to secure equality among

(1) 1 De G. & Sm. 357.

(2) Law Rep. 4 Eq. 305.

(3) 7th Ed. p. 1503.

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the children, and this would not be attained by valuing each annuity at the date of the grant, for the parties entitled to the three subsisting annuities will be in a better position than Mrs. *Parker* and the infant Plaintiff, as, although the annuities of the latter were released or determined, one in 1871 and the other in 1872, they will be charged at the value in 1860 of annuities for younger lives than those of the subsisting annuitants. The course adopted by the Chief Clerk, on the other hand, will produce equality. In *Kircudbright v. Kircudbright* (1) the annuity in question was treated as having determined, and the decision does not apply as an authority to a case where there are subsisting as well as determined annuities, all granted by the same instrument. Whether the payments in respect of these annuities were made under a legal obligation or not, they must be treated as advancements. But if the Court thinks that the principle contended for by the other side should be adopted, two out of the six annuities in this case were re-purchased by the settlor, not out of the appointed £6100, but by giving to the annuitant in exchange the settlor's life interest; and accordingly, if the annuity is in these two cases to be valued at the date of the grant, it ought also to be valued at the date of the re-purchase or substitution, and the value at the one time should be deducted from the other, the difference between the two values being the amount of the advancement to be brought into hotchpot by these two children; otherwise they are charged twice over, *i.e.*, with the value of the annuity in 1860 and with the income received on the £6100 during the settlor's life.

HALL, V.C. :—That does not produce justice. The question is, whether you are not to be charged with the value of the annuity as an annuity at the time of the advance, that is, at the time of the annuity being granted, and then the subsequent dealing with that annuity is matter of arrangement between the father and the child, and it is not the less an advance because the child has dealt with the father by arrangement for a valuable consideration. It does not cease to be an annuity to which the child was entitled. The child might have sold that annuity to anybody else, or made

(1) 8 Ves. 51.

an arrangement with somebody else about it. That would not be less an advance.

Hastings :—Then the sum given for it, *i.e.*, the interest upon the £6100, ought not to be brought into account; for the child should not be charged twice over.

Kekewich, in reply upon the last point.

HALL, V.C. :—

I think I must disregard for the present purpose, in applying the statute, the arrangement so come to. I cannot take it both ways, as Mr. *Kekewich* wishes me to do; I think that would be unreasonable and unjust. I must consider that arrangement as not having taken place at all, for the purpose of ascertaining the amount of the advance. I must take the amount of the advance as the sum which was covenanted to be paid by the settlor, that is, the annuity of £200 in each case, and take the value in each case as from the date of the settlement, having regard to the age of the annuitants at the time, and calculating the value of the annuities according to the *Succession Duty Act*.

With reference to Lady *Staveley's* annuity, the clause in the separation deed is that the annual income of the fund settled shall be taken *pro tanto*. So long as the income of the fund will satisfy the annuity it must be taken as a satisfaction, but there must be liberty to apply, and there must be some reasonable sum retained. That will meet any possible deficiency between the £200 a year which the testator covenanted to pay to Lady *Staveley* and the income which will be produced by the £5000 when invested by the trustees, which is to go as far as it will extend in satisfaction of the £200 a year income, and there will be liberty to apply. Some agreed sum representing the difference between £5000 at £4 per cent. and £5000 at £3 per cent. had better be taken as Lady *Staveley's* guarantee annuity fund and invested, so that the income can be resorted to in case of any deficiency.

My decision as to the £200 annuity to Lady *Staveley* will be applicable also to the £60 annuity which the father on Mrs.

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Parker's marriage covenanted to pay to her during their joint lives. Sums will, of course, be set apart to answer the other annuities.

From this decision Lady *Staveley* appealed. The appeal was heard on the 22nd of February, 1878.

Argument.

Kekewich, Q.C., and *John Henderson*, for the Appellant:—

With respect to the valuation of the annuities, the Appellant supported the view taken by the Vice-Chancellor at the hearing before him; but on working out the decree it is unfavourable to her, and she therefore appeals from it. We contend that the value of the annuities ought to be ascertained at the death of the intestate.

[JAMES, L.J.:—How is it possible to ascertain the value of the annuities at the date of the deed of separation, or indeed at any time before the death of the husband or wife? The deed provides that they shall cease if the husband and wife cohabit again.]

That point was not considered at the previous hearing, but it is an additional reason why the Vice-Chancellor's decree is erroneous. One daughter being dead, a difficulty is introduced, and the Court has a discretion in doing justice under the statute, and must take all circumstances into account. In the present case justice will be done by adding to the present value of the annuities the actual amount received by them during their father's life: *Todd v. Bielby* (1); *Potts v. Smith* (2); *Wright v. Lambert* (3); *Jones v. Jones* (4). The decree is also erroneous in not dealing with the appointment of £6100 *East India* Stock to Mrs. *Hatfeild* and Mrs. *Parker* as advancements. The life interests of these sums, so far as they exceed the annuities, ought to be brought into hotchpot.

Hastings, Q.C., and *Armstrong*, for the Plaintiff and Mr. and Mrs. *Parker* and their trustees:—

The income of the *East India* Stock ought not to be brought into account. The annuities were the absolute property of the

(1) 27 Beav. 353.

(2) Law Rep. 8 Eq. 683.

(3) 6 Ch. D. 649.

(4) 5 Hare, 440.

daughters, and they purchased the *East India* Stock with them. The transaction was not an advancement at all, but a purchase. With respect to the valuation of the annuities, we support the argument of the Appellant.

[JAMES, L.J.:—Can any annual sum paid by a father to his children be properly called an advancement? He is only performing his obligation to support them.]

If the Court takes that view, it will be only necessary to value the annuities from the death of the intestate, without regarding the past payments.

Dickinson, Q.C., and *W. Barber*, for Mr. and Mrs. *Tubbs*, Mr. and Mrs. *Patton* and their trustees, and Miss *Minet*:—

The covenant to pay an annuity is not like an allowance by the father to his child, which may be withdrawn, or the interest on a capital sum payable on the father's death. It is a covenant to pay a sum of principal and interest by annual instalments, and is in the nature of an advancement. An annuity was held to be an advancement in *Kircudbright v. Kircudbright* (1), and the principle was there laid down how it ought to be valued, namely, as at the date of the grant. That principle ought to be pursued in the present case. With respect to the difficulty arising out of the contingency of the husband and wife coming together again, that will not prevent its valuation by an actuary. It will be no more difficult than valuing an interest of a widow determinable on her death or marrying again, which is sometimes done in proceedings in bankruptcy: *Ex parte Blakemore* (2).

JAMES, L.J.:—

I am of opinion that, having regard to the principle of the rule of hotchpot and the words of the Act of Parliament, it is the duty of the Court to divide the money as nearly as it can do, having regard to all the circumstances of the case, and to have regard to all those circumstances for the purpose of ascertaining what really is an equal division of the estate of an intestate between his children at his death.

C. A.
1878
HATFIELD
v.
MINET.
Argument.

Judgment, C. A.
James, L.J.

(1) 8 Ves. 51.

(2) 5 Ch. D. 372.

C. A.

1878

HATFEILD

v.

MINET.

Judgment, C. A.
James, L.J.

Now, beyond all question, annual sums paid by way of annual allowances have never been taken into consideration in distribution. It is merely the mode in which the father chooses to deal with his own income in maintaining his family, and it is very difficult to distinguish the case we have before us—I mean up to a certain point—from the case of a mere annual sum given in that way for the proper maintenance of his family; just as we should, in the exercise of another jurisdiction, have made similar allowances to all the members of the family if the father had happened to be under our jurisdiction in Lunacy.

In this case the father and the mother could not agree, which resulted in there being a separation, and it is reasonable to suppose that one of the terms and conditions of the separation was that the father should make provision for his children. Accordingly the father makes an allowance for the six daughters, who lived with the mother. There were then three who were infants, one of whom was, I think, as young as eleven years; they were mere children, and the allowances made them seem to have been actually paid to the mother until they came of age. Those seem to me to be all allowances of the nature of income. Then there was a sum of £5000 given to one of the daughters, which was only income during the father's life. When, therefore, we come to see what it was the children had, and whether one had more than another—when we come to divide the property as at the death of the intestate, we find that one child had got £5000, and that the other children, except one who had died, had received the annuity of £200 up to this time. They had all, in effect, received the annual allowances as long as they were alive and able to receive them. That is the substance of the case. Then, when the father dies, £5000 is paid to one daughter out of the estate; and besides that, the annuities have by this time become debts which the three children have acquired a right to have provided for. One child has already taken more than she ought to have taken, and you must take out of the other shares the value of that which they have acquired a right to. They get the value of their annuities in addition to their shares, and therefore they must be brought into hotchpot.

Therefore it seems to me that by deducting the £5000 in the

one case, and the value at the death of the testator of the three annuities which are still subsisting in the other case, the principle of the *Statute of Distributions* will be carried out; that is to say, the making of as fair and equal a distribution between the children as it is under the circumstances possible to make.

C. A.
1878
HATFIELD
v.
MINET.

BAGGALLAY, L.J.:—

Judgment, C. A.
Baggallay, L.J.

I am of the same opinion. In all cases in which the question arises whether payments made by a father, who afterwards dies intestate, to or for the benefit of his children, are to be treated as advances, and in that respect to be set off in making an ultimate division of his property, regard must be had to the surrounding circumstances. The very principle upon which advances are set off by way of hotchpot is that of endeavouring as nearly as possible to do that which is equal justice among all the children of the dead man.

Now, when we regard the circumstances of this case, we find at once that the various annuities, to which reference has been made in the course of the argument, spring out of one transaction, namely, a separation deed between the father and the mother, and that upon that occasion the father and the mother, with the consent of the trustees, came to the conclusion that the fair and proper mode of making a provision for the maintenance of the six daughters was to secure to each of them an annuity of £200 for her life. In other words, the securing of the annuity was the mode in which the father discharged the obligation of providing maintenance.

No doubt there is the difficulty which Mr. *Dickinson* suggested, that the obligation on the part of the father for the maintenance, education, and support of his several children was different with regard to each individual daughter, varying in respect of their respective ages and possibly modified by other circumstances, but I think that we must have regard to the fact that the general system of equality is that to which we must give effect; and having regard to all the circumstances of the case, I am of opinion that the fair and equitable mode is to treat the period of the father's decease as the time when the obligations binding on him as a parent should cease, and that any payments thence-

C. A. forth made under the provisions of the deed should be treated
 1878 as advances. Upon that principle it would be a mere matter of
 ~~~~~  
 HATFIELD      calculation.

v.

MINET.

Judgment, C. A.  
 Thesiger, L.J.

THESIGER, L.J.:—

I am of the same opinion. If these annuities could have been looked upon as advancements in the lifetime of the father, and there had been no difficulty in ascertaining the contingency, it seems to me that the theoretical and just mode of valuing them would have been to value them from the date of the settlement; but here we have, first, the doubt as to whether they were advancements at all during the lifetime; and, secondly, we have the difficulty of ascertaining the value at the date of the settlement, owing to the doubtful character of the contingency; and therefore it seems to me that the just and proper way is to deal with the valuation as proposed.

Solicitors: *Dawes & Sons; Young, Jackson, & Beard.*



## FOSTER v. PARKER.

[1877 F. 31.]

M. R.

1878

Jan. 25.

*Mortgage—Foreclosure—Mortgagor's Estate in Infant Heir-at-Law—Form of Decree.*

In a foreclosure action, where the estate of the mortgagor was devised in trust for sale and had become vested in an infant, who was also one of the persons beneficially interested:—

*Held*, that the decree should contain a direction that, in case the mortgagees were not redeemed within six months, the infant should be a trustee for them within the meaning of the *Trustee Act*, and the executrix of the mortgagor be ordered to convey the estate to the mortgagees on his behalf.

THIS was a motion by the Plaintiffs in a foreclosure action, who claimed under a deposit of title-deeds, to vary the minutes of decree.

Statement.

The mortgagor had died, having by his will devised his real estate to trustees upon trust for sale and to divide the proceeds among his children. The trustees having disclaimed, the estate descended to the eldest son and heir-at-law of the mortgagor, who was an infant, and who was made a Defendant to the action.

At the trial of the action the usual foreclosure decree was made, but the Registrar in drawing it up gave the infant heir-at-law six months after coming of age to redeem.

*Dundas Gardiner*, for the Plaintiffs, now moved to vary the minutes by adding a declaration that in case the Plaintiffs were not redeemed within six months, the infant should be a trustee for them within the *Trustee Act*, and that his mother, who was executrix of the mortgagor, should be ordered to convey on his behalf.

Argument.

*Cozens-Hardy*, for the Defendants, contended that, as the infant was beneficially interested, he was entitled to have six months after coming of age to shew cause: *Newbury v. Marten* (1); also, that the Court ought not to make any such declaration at least until the order for foreclosure had been made absolute: *Smith v. Boucher* (2); *Lechmere v. Clamp* (3).

(1) 15 Jur. 166.

(2) 1 Sm. &amp; Giff. 72.

(3) 30 Beav. 218; 31 Beav. 578.

M. R.  
 1878  
 FOSTER  
 v.  
 PARKER.  
 —

JESSEL, M.R., said that for the purposes of this action the infant stood solely in the position of a trustee, and that the minutes must be varied accordingly.

Solicitors: *Cole & Jackson; Field, Roscoe, & Co.*

M. R.  
 1878  
 Feb. 22.  
 ✓

### FREEMAN v. COX.

[1878 F. 19.]

*Payment into Court—Motion—Non-appearance of Defendant—Sufficient Admission.*

In an administration action notice of motion was served upon a Defendant, an executor, for payment into Court of money, part of the testator's estate, which it was shewn by affidavit that he had received. The Defendant did not appear on the motion:—

*Held*, that, the Defendant not having disputed the affidavit, there was a sufficient admission that the money was in his hands, and that he must be ordered to pay it into Court.

Statement.  
 —

THIS was a motion for the payment into Court by the Defendant of two sums which formed part of the estate of a deceased testator.

*Hugh Fisher*, who died on the 23rd of July, 1877, by his will bequeathed all his property (except as therein mentioned) to the Plaintiff, and appointed the Plaintiff and Defendant executrix and executor of his will.

On the 5th of February, 1878, the Plaintiff issued a writ for the administration of the testator's estate, to which the Defendant appeared. The Plaintiff then, before any further proceedings had been taken, served upon the Defendant a notice of motion for payment into Court of a sum of £224 cash and of the proceeds of the sale of £1328 consols, alleged to have been received by the Defendant as part of the testator's estate.

It appeared by the Plaintiff's affidavit in support of the motion that the Plaintiff had signed a cheque for £224, being the balance of the testator's balance at his bankers, to enable the Defendant to pay the testator's debts, and had also given the Defendant a

power of attorney to enable him to sell the sum of consols, but that the greater part of the testator's debts still remained unpaid.

The Defendant did not appear on this motion.

*G. H. Lea*, in support of the motion, contended that the Court had jurisdiction to order the money to be paid into Court, notwithstanding the fact that there was no admission on the part of the Defendant that he had received the money. It appeared clearly on the evidence that the Defendant had had the money, and he could not derive any benefit from the fact that he had not appeared on the motion. He referred to *Jervis v. White* (1) and *London Syndicate v. Lord* (2).

JESSEL, M.R.:—

The question is, whether there is a sufficient admission on the part of the Defendant. In *Boschetti v. Power* (3) Lord Langdale observed: "The Court cannot on motion order money to be paid or stock transferred into Court, unless it has a distinct admission of the Defendant, that the money is in his hands or that the stock is in his name." The new Orders have no reference to such a case. I will therefore make a precedent. It seems to me that the principle on which the Court has ordered payment of money into Court has been that the Defendant must admit that the money is in his hands for the purpose of the application. In *Jervis v. White* Lord Eldon took the affidavit of the Plaintiff charging the Defendant with having a sum of money in his hands and an affidavit of the Defendant before answer together as an admission, and ordered the money to be paid into Court. Here we have the affidavit of the Plaintiff and the service of the notice of motion upon the Defendant. This, I think, is a sufficient admission, the principle being to make the Defendant pay into Court what he does not dispute to be owing from him.

Solicitors : *Roberts & Barlow*.

(1) 6 Ves. 738.

(2) *Ante*, p. 84.

(3) 8 Beav. 98.

M. R.

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FREEMAN

v.  
COX.

Argument.

Judgment.

M. R.

*In re* LONGDENDALE COTTON SPINNING COMPANY.

1878

March 8.

*Chancery Court of Lancaster—Action—Jurisdiction—Person within but Property beyond Local Limits—Chancery Jurisdiction in Personam—Company—Action by Mortgagee after Winding-up Order—Court of Chancery of Lancaster Act, 1854, s. 7—Judicature Act, 1873, s. 18, sub-s. 2.*

1874 D 650

The principle under which the jurisdiction *in personam* of the old Court of Chancery extends, in effect, to property wherever situate, applies to the Chancery Court of the County Palatine of *Lancaster*.

Thus, where the Defendants in an action in the Chancery Court of the County Palatine of *Lancaster* were within but their property was beyond the boundary of the local jurisdiction, it was *held* that the jurisdiction of that Court was the jurisdiction *in personam* of the old Court of Chancery within the boundary, and therefore that the Palatine Court could exercise jurisdiction over the property, and could enforce any order in the action by applying to the Supreme Court under the *Court of Chancery of Lancaster Act*, 1854, s. 7, and *Judicature Act*, 1873, s. 18, sub-s. 2.

Motion by the Defendants to stay the action for want of jurisdiction refused with costs.

The mere fact that an order has been made for winding up a company does not prevent a debenture-holder or mortgagee of the company from bringing an action to realize his security.

Statement.

THE *Longdendale Cotton Spinning Company, Limited*, was formed in 1875, the subscribers to the memorandum of association being persons residing in or near *Manchester*. The registered office of the company was in *Manchester*, and within the limits of the jurisdiction of the County Palatine of *Lancaster*, but its property, consisting of a mill and machinery, was situate at *Hollingworth*, in the county of *Cheshire*, beyond those limits.

In October, 1877, the company passed resolutions to wind up voluntarily, and appointed a liquidator.

In February, 1878, one of the six preference debenture-holders of the company, a *Manchester* man, commenced an action in the Chancery Court of the County Palatine for a declaration that the debentures constituted a first charge on the property of the company, and to have the charge enforced by foreclosure or sale.

The liquidator now moved to stay the action on the ground that the company's property was not subject to the jurisdiction of the Palatine Court.

The liquidator had, it appeared, admitted that the six debenture-



ture-holders held a first charge on the company's property, and had expressed to them his willingness to sell the property for the purpose of discharging the debenture debt.

M. R.

1878

*In re*

LONGDENDALE  
COTTON  
SPINNING  
COMPANY.

Argument.

*G. B. Finch*, for the motion :—

The company's property being outside the limits of the local jurisdiction of the Palatine Court, that Court can exercise no jurisdiction over it, and would indeed have no means of enforcing any order in this action; for it could not direct sequestration, which is the only remedy against a corporation for breach of an order.

It has, in fact, been decided in *Wynne v. Hughes* (1) that the Palatine Court cannot order a sale of property not within its jurisdiction.

[JESSEL, M.R.:—*Wynne v. Hughes* was cited in *Bradley v. Stelfox* (2), but Lord *Westbury's* observations do not seem very favourable to it.]

This action is quite unnecessary, as we have admitted the Plaintiff's debt, and are ourselves willing to sell; and your Lordship has laid down in *In re David Lloyd & Co.* (3) that, after an order has been made to wind up a company, the Court will restrain a mortgagee's action for realizing his security if the company can offer the mortgagee all he is entitled to, foreclosure or sale. That question, in the case of an ordinary creditor of the company, has also been considered by your Lordship in *In re Poole Firebrick and Blue Clay Company* (4).

Moreover, if this action is allowed to proceed, the probability is that any surplus arising from a sale will be swallowed up in costs, and nothing will be left for the general creditors. I submit it would be a novel thing to say that where the Defendants in an action brought in the Palatine Court are within the jurisdiction of that Court, and the property not, the jurisdiction extends to the property.

*C. Parke*, for the Plaintiff in the action :—

This case is really covered by *In re David Lloyd & Co.*,

(1) 26 Beav. 377, 383. *Smith's 165* (3) 6 Ch. D. 339, 343.

(2) 3 D. J. & S. 402. (4) Law Rep. 17 Eq. 268.

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1878

*In re*

LONGDENDALE

COTTON  
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Judgment.

where your Lordship said the rights of a mortgagee against a company should not be interfered with except under very special circumstances, which do not exist here.

*Finch*, in reply.

JESSEL, M.R. :—

In this case it appears there is a cotton-mill belonging to a *Manchester* corporation carrying on business in *Manchester*. This cotton-mill happens to be situate in *Cheshire*, on the other side of the river *Mersey*, but the principal office of the corporation is in *Manchester*. To all intents and purposes it is a *Manchester* business carried on by *Manchester* people.

Under these circumstances, these *Manchester* people mortgaged their mill to a *Manchester* man.

The proprietors of this cotton-mill were a limited company, and, having got into difficulties, passed resolutions to wind up voluntarily. The mortgagee finding it convenient to do so, being a *Manchester* man, brought an action for foreclosure or sale in the Chancery Court of the County Palatine of *Lancaster*.

This is a motion by the liquidator of the company to restrain that action on two grounds; the first, and most important one, being that the mill and property of the company are out of the jurisdiction of the Court. This is partly true and partly untrue. It is true that the limit or boundary of the local jurisdiction does not include the property; but the jurisdiction of the local Court is the jurisdiction of the old Court of Chancery within the boundary; and the jurisdiction of the Court of Chancery is a jurisdiction *in personam*, that is, over the person within the limits of the jurisdiction and enforceable against the person and not the property of the person. But then the Court, by coercion of the person within its jurisdiction, is enabled in effect to exercise jurisdiction over the property of that person wherever it may be situate.

That being so, there can be no doubt whatever that the local Court has jurisdiction over this *Manchester* corporation, and having that jurisdiction can exercise a jurisdiction over the property of the corporation, though not locally within it. The principle of the Court of Chancery jurisdiction *in personam* in fact applies.

But then it is said that any order in the action can only be enforced against the company by sequestration of its property, and the property being out of the jurisdiction, sequestration cannot be enforced. That is an odd complaint to be made by a defendant. One would have thought that a complaint of that kind would more naturally come from a plaintiff, not from a defendant who would of course object to the exercise of such a remedy. But that difficulty does not in fact exist, because it is provided by the 7th section of the *Court of Chancery of Lancaster Act*, 1854 (17 & 18 Vict. c. 82), that, "in all cases in which, by reason of any person being out of the jurisdiction of the Court of Chancery of the said County Palatine, or otherwise, . . . any contempt of the said Court cannot be effectually punished, it shall be lawful for the Court of Appeal, upon the application of any person concerned, to make such order or orders . . . for the punishment of any such contempt, as to the said Court of Appeal shall seem just, and according to the practice of the High Court of Chancery in like matters; and every such order shall have the same operation and effect as an order of the High Court of Chancery, and shall and may be enforced, and all proceedings shall and may be had thereupon, as if the same had been made by that Court."

The powers of the Palatine Court of Appeal are now transferred to the Court of Appeal of the Supreme Court, by sect. 18, sub-s. 2, of the *Judicature Act*, 1873. Therefore, you can now make any order of the Palatine Court effectual by applying to the Supreme Court; and I need not say that any such application would be granted as a matter of course. Consequently there can be no difficulty whatever in enforcing an order of the local Court.

Then the third objection is that the mortgagors are themselves desirous of selling the property, and that, if the mortgagee sells the property in the action, the probability is that nothing will be left for the general creditors; whereas if the mortgagors sell it, the result may be better for all parties. The answer to that is, the mortgagors had better redeem. If the mortgagee wants to sell he has the right to sell, and to prevent him from selling would be an interference with his rights, and I see no equity in the mortgagors which should deprive him of those rights.

Then the only other point is whether the winding-up makes

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COTTON  
SPINNING  
COMPANY.  
—  
Judgment.

any difference or confers any new rights. The mere fact that a winding-up order has been made makes no difference, and does not confer upon the company the right of preventing a mortgagee from realizing his security; and for that proposition I have the authority of the Court of Appeal in *In re David Lloyd & Co.* (1), an authority which emphatically negatives the existence of any such right.

I therefore refuse the motion, with costs.

Solicitors: *Le Riche*, agent for *J. Gardner, Manchester*; *F. Venn & Son*, agents for *Collins, Robinson, Collins, & Driffield, Liverpool*.

M. R.  
1878  
March 22. ✓

*In re* STUBBS' ESTATE.  
HANSON v. STUBBS.

[1878 S. 135.]

*Administration—Creditors—Priority—Transfer of Action in Exchequer Division to Chancery Division—Rules of Court, 1875, Order LI., r. 2.*

1644D369  
871  
2044D547  
An order *nisi* to sign judgment had been obtained in a creditors' action against an executrix in the Exchequer Division, for a balance admitted to be due from a testator's estate, but before judgment was signed a decree for the administration of the same estate in the Chancery Division had been obtained by another creditor. On the motion of the parties to the administration action for the transfer of the first action to the Chancery Division:—

*Held*, that the creditors who were Plaintiffs in the Exchequer action had no priority over the other creditors, and that the action must be transferred, and the proceedings therein stayed, the Plaintiffs in that action to be at liberty to prove for their claim and costs in the administration.

Statement.  
—

THIS was a motion under Rules of Court, 1875, Order LI., rule 2, to transfer to this branch of the Court an action of *Anderson v. Stubbs*, pending in the Exchequer Division.

The writ in the action of *Anderson v. Stubbs* was issued on the 19th of February, 1878, by certain creditors of the estate of *Richard Stubbs*, deceased, claiming payment by the Defendant, Mrs. *Stubbs*, his executrix, of the sum of £161 16s. 3d., being the balance of



moneys received by *Richard Stubbs* on their behalf, after giving credit for costs alleged to be due from them to his estate. The sum was admitted by the Defendant to be due to the Plaintiffs in that action, which was undefended.

On the 15th of March, on the Plaintiffs' application to one of the Masters in the Exchequer Division, it was ordered that, unless the said amount was paid into Court or to the solicitors of the Plaintiffs in the action within five days, the Plaintiffs should be at liberty to sign final judgment for the said amount.

On the 20th of March, the Defendant appealed against the Master's order to *Field*, J., but the appeal was dismissed with costs.

On the 21st of March the sum of £161 16s. 3d. was paid into the Court of Exchequer on behalf of the Defendant.

In the meantime a second action of *Hanson v. Stubbs* had been commenced in the Chancery Division against Mrs. *Stubbs* by another creditor of *Richard Stubbs*, for the administration of his estate, and the usual judgment had been obtained. The present motion was made on behalf of the Plaintiff and Defendant in the last-mentioned action for the transfer of *Anderson v. Stubbs* to this branch of the Court.

*W. W. Karlake*, in support of the motion.

Argument.

*Maidlow*, for the Plaintiffs in *Anderson v. Stubbs*, citing *Parker v. Ringham* (1), did not object to the transfer, but contended that the Plaintiffs ought to be placed in as good a position as if they had actually signed judgment against the executrix, or at any rate, that the fund paid in ought to be retained as security to answer their claim.

JESSEL, M.R. :—

Judgment.

I am clear that the Act 32 & 33 Vict. c. 46 does not take away the priority over other creditors of a judgment creditor who has obtained judgment against an executor before administration decree. This was laid down in the case of *In re Williams' Estate* (2).

(1) 33 Beav. 535.

(2) Law Rep. 15 Eq. 270.

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ESTATE.  
HANSON  
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*In re*  
STUBBS'  
ESTATE.  
HANSON  
v.  
STUBBS.  
Judgment.

In this case, however, the Plaintiffs in *Anderson v. Stubbs* had not obtained judgment, but only an order enabling them to sign judgment if the amount of the debt was not paid within five days. In the meanwhile another creditor comes in and obtains judgment in an administration action on behalf of all the creditors, and the parties to that action now ask me to transfer the action in the Exchequer Division to this branch of the Court, and to stay the proceedings in that action, there being a question of set-off. This is opposed by the creditors, who are Plaintiffs in the other action, on the ground that they have a security on the fund in Court for their debt, which they would no doubt be entitled to claim were it not for the intermediate administration judgment; but after the decree the fund ought not properly to have been paid in.

*Anderson* I will order the transfer of the action of *Hanson v. Stubbs* to the Chancery Division, and a transfer of the fund in Court to the credit of the administration action, and further proceedings in the first action to be stayed; the Plaintiffs in that action to be at liberty to prove for their claim and costs in the administration action, without prejudice to any application by the Plaintiffs in that action to have the conduct of the administration action.

Solicitors: *Pawle & Co.; Tatham, Procter, & Co.*

M. R.

1870

March 25.

*In re* HEDGMAN.  
MORLEY v. CROXON.

[1878 H. 66.]

*Charity—Mortmain—Gift of Money to “support or found” a School—9 Geo. 2, c. 36.*

A gift by will of money for the “support” of a school does not necessarily imply that the money is to be “laid out or disposed of in the purchase of any lands, tenements, or hereditaments,” so as to render the gift void under the *Mortmain Act* (9 Geo. 2, c. 36).

A testator bequeathed a sum of money to trustees to be applied by them in “supporting or founding” free or ragged schools for poor children in a particular parish. For some years prior to the date of the will and down to the testator’s death there existed in the parish a school for the children of

the poorest inhabitants, the testator being its principal supporter. It was held in a hired room, the rent of which was paid by the testator, who also paid the teacher's salary :—

*Held*,—reading the will as creating an alternative trust,—a good charitable gift.

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*In re*  
HEDGMAN.  
MORLEY  
v.  
CROXON.  
—  
Statement.  
—

## SPECIAL CASE.

*James Hedgman*, who died in April, 1877, by his will, dated in November, 1876, bequeathed to his trustees “the sum of £3000 to be applied by them in supporting or founding free or ragged schools for gutter children or for the poorest of the poor.”

By a codicil the testator directed “that such schools or school should be situate in the parish of *Barnes*, in the county of *Surrey*, and should be for the resident poor of the said parish.”

At the date of the will there existed, and had existed for some years previously, in the parish of *Barnes*, where the testator resided, a free school for the younger children of the poorest inhabitants; this school continued to exist down to the testator's death, and was still existing; it had been and was still held in a room rented for the purpose on a yearly tenancy, and was presided over by a female teacher. The school was originally established through the exertions of the rector of *Barnes*, but in 1872 the testator became its principal subscriber, and from the year 1874 until his death he paid the rent of the room where it was held, and the teacher's salary, and took upon himself the whole pecuniary responsibility in connection with the school.

The question for the opinion of the Court was whether the bequest of the £3000 was valid.

*Byrne*, for the Plaintiffs, the trustees of the will.

Argument.  
—

*Rigby*, for the Attorney-General, Defendant :—

This is a good charitable gift. The gift is in the alternative, “supporting or founding.” “Founding” might imply building and so render the gift void under the *Mortmain Act*, 9 Geo. 2, c. 36; I therefore rely on “supporting,” which does not necessarily imply a direction to build or purchase land for the purpose. “Supporting” may be equivalent to “providing,” and mean hiring a room or building, as in *Johnston v. Swann* (1); and the fact that

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this school was being held in a hired room at the date of the testator's will and of his death affords a strong presumption in favour of that meaning. This is a gift for educational purposes, and is therefore charitable: *Beaumont v. Oliveira* (1).

*Whitehorne*, for the Defendants, the residuary legatees:—

This is not an alternative gift. The testator in speaking of “supporting or founding” means one and the same thing. The two words cannot be separated so as to make two distinct gifts. Of the numerous cases on the subject there is not one in which the words “supporting” and “founding” occur together, but *Hopkins v. Phillips* (2) is a distinct authority that a bequest to “found” a chapel implies building, and is therefore void.

A gift to “establish,” which is equivalent to “found,” is also bad: *Attorney-General v. Hodgson* (3); *Re Clancy* (4); *Longstaff v. Rennison* (5); *Attorney-General v. Hall* (6).

The testator evidently contemplated the creation of a building, and the rule is now well settled, that, to be valid, a charitable gift for building must refer to an existing site, or expressly exclude the application of the money in the purchase of land: *Pratt v. Harvey* (7); *Edwards v. Hall* (8); *Hawkins v. Allen* (9); *Cox v. Davie* (10).

Whatever meaning, then, may be attributable to the word “supporting,” one part of this gift is clearly illegal; and the rule is that where the illegal part of a gift is inseparable from the legal, you are not at liberty to select the legal part and discard the illegal, but the whole is bad. In short, the invalidity of the one affects the validity of the other. In all cases of alternative gifts, where the one has been held good and the other bad, the testator has clearly indicated an intention that one or the other shall take effect, as in *Dent v. Allcroft* (11) and *Edwards v. Hall*.

I submit, therefore, that this gift is void, and that the £3000 falls into the residue.

(1) Law Rep. 4 Ch. 309.

(2) 3 Giff. 182.

(3) 15 Sim. 146.

(4) 16 Beav. 295.

(5) 1 Drew. 28.

(6) 9 Hare, 647.

(7) Law Rep. 12 Eq. 544.

(8) 11 Hare, 1.

(9) Law Rep. 10 Eq. 246.

(10) 7 Ch. D. 204.

(11) 30 Beav. 335.



JESSEL, M.R. :—

Whether the cases upon this subject will ever cease it is impossible to say. The authorities are already too numerous to mention, but there happens to be no decision upon these particular words. This is a gift of money to be applied “in supporting or founding free or ragged schools for gutter children or for the poorest of the poor” in a particular parish. The contention on one side is that the words “supporting or founding” are not to be read literally, but as “supporting and founding.” I see no reason for adopting that contention. The fair reading of the words is the literal one; it is an alternative trust. Now we have the fact that the testator had for some years before the date of his will supported a school, and that this school was held in a room in *Barnes* hired for the purpose. The testator was the principal subscriber to the school; he paid the rent of the room, and the teacher’s salary; that was his position as regards the school at the dates of his will, of his codicil, and of his death.

There was then a school actually existing at *Barnes* which he himself supported; and, therefore, considering how he himself stood as regards this particular school, and the fact that he was its principal supporter, I think the words are plain.

Now what does the word “support” mean? Does it imply a direction that the money shall, in the words of the statute (9 Geo. 2, c. 36), be “laid out or disposed of in the purchase of any lands, tenements, or hereditaments?” If anybody were to tell me he intended to “support” a particular charity I should not infer that he was going to buy land or build a house for the purpose. There is no reason for assuming that the word has any such meaning. It does not convey to one’s mind the notion of building, or of buying land. In order to hold that a trust to “support” a charity is obnoxious to the statute, I must consider it as a trust to “purchase lands, tenements, or hereditaments.” I am of opinion it has no such meaning.

Reading, then, the words of the gift literally, they do not necessarily or primarily imply the purchase of land or a house, and, therefore, I hold this to be a good charitable gift.

Solicitors: *W. M. Shirreff; Hare & Fell.*

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[1875 L. 123.]

Feb. 4.

*Bankers—Credit Agency—Remittances to cover Advances—Appropriation—Discounting expected Remittances—Agents—Constructive Notice.*

The Plaintiffs, bankers at *Lima*, established a credit agency with the *General Company* in *London*, and agreed to send remittances within ninety days to cover drafts. The *General Company*, being in difficulties, obtained an advance of money from the *Peruvian Bank*, to be repaid out of expected remittances from the *Lima Bank* to cover bills then current, and the *Peruvian Bank* employed as agents to receive and select from the expected securities, the managing director of the *General Company* and their own managing director, who had been, two years previously, the manager of the *General Company*, and was cognisant of and party to the arrangement with the *Lima Bank*. The securities were selected by and handed over to the *Peruvian Bank* upon their arrival, and the following day the *General Company* stopped payment and was wound up:—

*Held*, that the *Lima Bank* had no title to recover the securities from the *Peruvian Bank*.

Statement.

THIS was a bill filed by the *Bank of Lima*, claiming to recover from the *Anglo-Peruvian Bank* the sum of £1000, the produce of a bill of exchange, and £8000, the proceeds of a box of gold eagles.

In the year 1871 the Plaintiffs, the *Banco de Lima*, carrying on the business of bankers in the city of *Lima*, entered into a correspondence with an agent of the *General South American Company*, carrying on business in *London*, for the purpose of establishing an agency upon whom they could draw bills, and the correspondence resulted in an arrangement comprised in the following letter dated the 11th of April, 1871, written by the managing directors of the bank to Mr. *Chavez*, the agent of the *General Company*:—

“Dear Sir,—We have perused the basis which you have been pleased to lay down for opening a credit to the *Bank of Lima*, and take the liberty to submit a project of Agreement on this subject, so as to know if the same is in conformity with the construction which we have placed on the said basis, and if it meets with your approval:

“Art. 1st. The total amount of the credit to be £100,000, to be

disposed of totally or in part, as may be convenient to the bank, by means of drafts on *London* at ninety days' sight on the *General South American Company, Limited*.

"Art. 2nd. Immediately upon the bank issuing the first draft, it will pay to the *General South American Company* one-half per cent. commission for opening the credit on the total sum of £100,000; that is to say, five hundred pounds sterling for the amount thereof; and the said payment of commission, it is understood, is to be once for all.

"Art. 3rd. It will also pay to the said *South American Company* a commission of three-quarter per cent. for acceptance and payment of bills on the amount of drafts issued by the *Bank of Lima* on the said company.

"Art. 4th. The *Bank of Lima* shall allow to the *South American Company* interest at 5 per cent. per annum, or 1 per cent. more than the rate of the *Bank of England*, when the same shall exceed 5 per cent. per annum.

"Art. 5th. The *Bank of Lima* is under the strict obligation to cover its drafts within the ninety days following the dates of the acceptances in *London*, with other bills at ninety days' sight not drawn on the same *General South American Company*.

"Art. 6th. The credit of £100,000 shall always be open to the *Bank of Lima* as long as the said bank shall reimburse the *General South American Company* the sums for which it may have drawn against it.

"Art. 7th. The bills to be drawn by the *Bank of Lima* on the *General South American Company* must unavoidably be signed by one of the two managers who sign these presents, placing before the said signature the following words: For the *Bank of Lima*—The Managing Director."

This letter was submitted by Mr. *Chavez* to the *General Company*, who in a letter to their agents dated the 16th of May, 1871, accepted the terms therein specified, but recommended him to tell the managers of the *Banco de Lima* that they would as a general rule have to cover their drafts seventy-five days after their respective dates. The following letter was also addressed to the *Banco de Lima*, and signed by the managers, *Thomas Wheelock* and *A. de Gessler*:—"Mr. *Chavez*, our agent in your city, has communicated

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to us the basis on which he has opened in the name of this company a credit to the bank so worthily managed by you, for £100,000. We are glad to inform you that this credit has been confirmed by the board of this company."

In the month of August, 1871, the *Bank of Lima* commenced to draw upon the *General Company* under the agreement for a credit, and business continued to be conducted between the Plaintiffs and the company upon the footing of that arrangement down to the beginning of 1875, when the events which gave rise to this suit occurred. About this time the *General Company* were in difficulties, and in February, 1875, a sum of £30,000 was borrowed by the *General Company* from the *Anglo-Peruvian Bank*, which sum was repaid before the end of the month.

On the 13th of February, 1875, the *Bank of Lima* despatched to the *General Company* a letter inclosing bills of exchange to the amount of £5000; and on the same day the Plaintiff bank despatched 2000 American gold eagles for the same purpose, the bill of lading for the gold being posted on the same day as the letter. One of the bills forming part of the £5000 despatched on the 13th of February was a bill for £1000 on *Dreyfus Brothers & Co.*, and it was the proceeds of that bill for £1000 and the proceeds of the gold which the Plaintiffs now sought to recover from the *Anglo-Peruvian Bank*.

On the 1st of March, 1875, the state of the credit between the Plaintiff bank and the *General Company* was this: The *General Company* had in their hands a sum of £27,450 17s. 9d. balance in favour of the *Bank of Lima*, and on the 3rd of March, when other drafts of the Plaintiff bank matured and were paid, the *General Company* still had a balance in their hands in favour of the Plaintiff bank of about £20,000.

On the 3rd of March, 1875, the *General Company*, at a meeting at which was present, amongst other persons, Mr. *Schwank*, as one of the managing directors, passed a resolution, in accordance with which a letter bearing the seal of the company was sent to the *Anglo-Peruvian Bank*, which was to the following effect:—

"This company is in expectation of receiving certain bills or remittances by the West Indian Mail, which is due on or about the 16th instant, from the parties set out in the list sent herewith, and



is in immediate want of funds. This is to request you to provide the company with funds by discounting the said remittances before receipt of the same, and for that purpose to open a credit to the amount of £30,000 until the 17th instant in favour of the company, to be made available by cheques of the company. The bills so drawn will be paid to and received by the company by way of discount in advance of the said bills, and the bills will be delivered to you or your nominees as they arrive, duly indorsed over to your bank in blank, and, if you require it, the company at their expense will procure the same to be discounted. Your bank is to charge, and the company will pay, a commission of 1 per cent. and interest at 5 per cent. per annum on the said sum of £30,000, together with all brokerage discounts and other expenses and charges, and the company hereby guarantees to you that the said remittances, to an amount sufficient to pay you under the said credit, will arrive before the 17th instant; and if they do not, or are insufficient, the company will pay to you all moneys paid by you under the said credit, together with the above-named commission, interest, and expenses."

This letter was accompanied by the list of expected remittances therein referred to, and among the items in this list the £16,000 expected from the Plaintiffs' bank was included.

The *Anglo-Peruvian Bank* acceded to the request contained in the *General Company's* letter of the 3rd of March, 1875, by a letter of the same date, signed by *A. de Gessler*, managing director, in which was contained the following passage: "We beg to nominate Messrs. *Napoleon Canevaro* and *A. Schwank* as the gentlemen on our behalf to whom you are to deliver the remittances and bills you mention in your letter as soon as received."

As an additional security to the *Anglo-Peruvian Bank*, there was a letter of guarantee given by a Mr. *de Lazzarraga*, that a certain sum of £24,570 comprised in the list sent by the *Bank of Lima* and drawn upon the *Banco del Ecuador Guayaquil* would be duly paid by that bank.

The *General Company* then proceeded to draw upon the *Anglo-Peruvian Bank*, on dates between the 3rd and 5th of March, both inclusive, for sums closely approaching to the £30,000, the full amount of the credit. On the 16th of March the *General Company*

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received the remittances from the Plaintiff bank despatched from *Lima* on the 13th of February, consisting, amongst other securities, of 2000 American gold eagles and £5000 of bills, including the £1000 bill on *Dreyfus Brothers & Co.* On the same 16th of March Mr. *Schwank* wrote to the *Anglo-Peruvian Bank* a letter in which he inclosed and handed to them, among other securities, the bill of lading for the 2000 gold eagles and the £1000 bill on *Dreyfus & Co.* The following day—the 17th of March—the 2000 gold eagles were delivered to the *Anglo-Peruvian Bank*, and were by them sold (through the agency of Messrs. *Mocatta & Goldsmid*), and realized £8074 7s. 1d. The account current between the *Anglo-Peruvian Bank* and the *General Company* was then settled by the bank handing to the company a cheque for £534 18s. 4d., the balance in favour of the *General Company*, and at the same time Mr. *de Lazzarraga* was released from the guarantee he had given as before stated.

On the same 17th of March the *General Company* suspended payment, and on the next day the petition was presented, upon which the *General Company* was ordered to be wound up under supervision.

Upon going into liquidation, it was discovered that of the balance of £31,842 8s. 10d. which the *General Company* held on the 17th of March for covering the remittances of the Plaintiff bank, they had no more than £4000 of bills in hand.

Argument.  
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*Glasse*, Q.C., and *Kekewich*, Q.C., for the Plaintiffs:—

First, we say that the bill and the gold were sent to this country to be applied for a specific purpose, namely, to meet the bills. They never in fact became the property of the *General Company*, nor did they come into their possession, because they were received by the agents of the *Peruvian Bank* and diverted from their proper course and from their original destination. This was an improper and unfair mode of dealing, and contrary to mercantile usage.

Secondly, we say that notice to the *Anglo-Peruvian Bank* is clearly proved from the fact of Mr. *Schwank* and Mr. *de Gessler* being employed as their agents. Therefore they could only take such title as the *General Company* could confer, which was a qualified title.

*J. Pearson, Q.C., and Speed, for the Anglo-Peruvian Bank:—*

The arrangement was for the *Bank of Lima* to send remittances in sufficient time to cover the acceptances of the *General Company*, but these remittances were not supposed to be an exact cover for each special advance. The acceptances were of various amounts, and so were the remittances, but in the running account between the two parties it would have been impossible to have sent a remittance for each acceptance; the amount of bills or other remittances received from the *Lima Bank* would, in the usual course of business, be carried to the general credit of the account. No particular bill or other remittance would be appropriated to any particular acceptance that had been given by the *General Company*. Whatever complaints the *Bank of Lima* may have against the *General Company*, they can have none against the *Anglo-Peruvian Bank*, who took these remittances which the *General Company* had a right to discount.

There is nothing to affect us with notice: *Worsley v. Earl of Scarborough* (1). Notice to *Schwank* was no notice to us, and this brings it within the cases of *Kennedy v. Green* (2); *Ex parte Oriental Commercial Bank* (3); *Waldy v. Gray* (4); *Perry v. Holl* (5). The right of property in the gold as well as in the bill passed to the *General Company: Coventry v. Gladstone* (6); *Shepherd v. Harrison* (7).

*Romer, and T. P. Price, for the General South American Company*, claimed no interest in the bill of exchange or the gold, but submitted that they were entitled to discount the bill, and to deal with the gold in any way they thought fit, and that they acted *bonâ fide* in all their transactions with the *Lima Bank*.

*Glasse, in reply.*

MALINS, V.C.:—

I should have been glad if this question could have been submitted to the proper tribunal for deciding a case as to the rights

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(1) 3 Atk. 392.

(2) 3 My. & K. 699.

(3) Law Rep. 5 Ch. 358.

(4) Law Rep. 20 Eq. 238.

(5) 2 D. F. & J. 38.

(6) Law Rep. 4 Eq. 493.

(7) Law Rep. 5 H. L. 116.

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arising out of a mercantile transaction, namely, a jury of merchants sitting at *Guildhall*, but as it arises out of a winding-up business it falls upon me to decide it.

The transactions, as admitted on both sides, are these:—The *General South American Company* was established in the city of *London* in the year 1868, and was in very high credit and in good repute in the year 1871. The *Bank of Lima* were desirous of establishing an agency in *London* upon whom they could draw as a matter of convenience; a correspondence was carried on between the *Bank of Lima* and the *General Company*, the result of which was that the *Bank of Lima* was to be at liberty to draw upon the *General Company* to the extent of £100,000. Of course the *General Company* were to be protected against liability under this arrangement; and the stipulation upon that subject is the 5th article in the letter of the 11th of April, 1871.

This arrangement, which was confirmed by the *General Company*, seems to have gone on with perfect satisfaction to both parties from 1871 to the month of March, 1875, when the transaction, the effect of which I am now called upon to decide, took place. It seems that the *Bank of Lima*, at their will and pleasure, did draw upon the *General Company* for £100,000; and it is clear that the *Bank of Lima* faithfully performed their part of the contract of covering their liabilities with bills in pursuance of this article of the contract. In the spring of 1875 it seems that the *General Company* were somewhat in difficulties; for it is stated that in the month of February of that year a sum of £30,000 was borrowed by the *General Company* of the *Anglo-Peruvian Bank*, which sum was repaid before the end of the month, that is, within fourteen days. I think the circumstance of such a company borrowing is an indication that things were not going on quite well, for a company like this, with a very large capital, should not require to borrow at all: but they were borrowers, and they repaid their loan. That the *General Company*, therefore, were struggling with difficulties in the spring of 1875 can admit of no doubt.

Now the course of dealing, as I have stated, having gone on for a period of four years between the *Bank of Lima* and their agents in *London*, the *General Company*, the *Bank of Lima* had advised that they had forwarded a box of gold and had also sent certain



bills of exchange. That advice had not been received in *London* on the 3rd of March, but, according to the usual course of dealing between the parties, the *General Company* expected, and I suppose reasonably expected, that on or before the 17th of March they should receive remittances not only from the *Bank of Lima*, but remittances to a very large amount from other quarters, which would enable them to meet all their engagements. A list of them is given to the *Anglo-Peruvian Bank*, amounting to £99,310, but, being temporarily pressed, and having had transactions with the *Anglo-Peruvian Bank* before, on the 3rd of March, 1875, in pursuance of a resolution which they had themselves passed, the *General Company* addressed to the *Anglo-Peruvian Bank* the letter of the 3rd of March, 1871, which is the foundation of the whole transaction, and which was in these terms:—"This company is in expectation of receiving certain bills or remittances by the West Indian Mail, which is due on or about the 16th instant, from the parties set out in the list sent herewith, and others, and is in immediate want of funds. This is to request you to provide the company with funds by discounting the said remittances before receipt of the same, and for that purpose to open a credit to the amount of £30,000 until the 17th instant in favour of the company, to be made available by cheques of the company. The amount so paid will be paid to and received by the company by way of discount in advance on the said bills, and the bills will be delivered to you or your nominees as they arrive, duly indorsed over to your bank in full; and if you require it, the company, at their expense, will procure the same to be discounted." Then it sets out the rate of charges.

With the letter there was sent a list which stated: "*Banco del Ecuador Guayaquil*, £24,570 6s. 10d."—that is, they expect to receive that amount from them. Then, "*Banco de Lima—Lima*, £16,000"—that is, without specifying any particular bills, which they could not do, or any particular mode of remittance, but generally that they expect to receive that sum from the *Bank of Lima* on or before the 17th, in the usual course of post. They knew very well when the mail would arrive; I suppose the proper day for arrival is the 16th, and therefore they said, on or about the 16th "we expect to receive from the *Bank of Lima* 16,000."

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The *Anglo-Peruvian Bank* acceded to the request for making the advance of £30,000, and they relied upon the remittances which were promised; and therefore they wrote: "In reply to your application of this date for an advance, we beg to say that we are willing to make the same on the conditions specified. We beg to nominate Messrs. *Napoleon Canevaro* and *A. Schwank* as the gentlemen on our behalf to whom you are to deliver the remittances and bills you mention in your letter as soon as received."

Now that applies not merely to the £16,000 expected from the *Bank of Lima*, but the £24,000 from the *Banco del Ecuador Guayaquil*, and all the others which are enumerated here, amounting to £99,310. So that Mr. *Schwank* and Mr. *Canevaro* are not appointed merely to receive remittances from the *Bank of Lima*, but all the others which are mentioned in that letter. Thereupon the *Anglo-Peruvian Bank* having acceded to the request to make the advance, sent a cheque-book which the *General Company* could use; and in pursuance of that letter the *General Company* drew upon them the next day for £22,000, and in a very few days the whole of the £30,000 was drawn out of the *Anglo-Peruvian Bank*, and also within a very few days they began paying back again. There is a sum of between £2000 and £3000 paid back on account of the £30,000, certainly within five days.

The transaction went on, and the 16th of March arrived, and on the morning of that day the *General Company* received by post, amongst other things, a bill drawn on *Dreyfus & Co. of Paris* for £1000. They also received by the same post a bill of lading for a box of 2000 gold eagles, which it turns out were sold for the sum of £8000, or rather more. Therefore the property they received on the 16th, which is the only thing I have to deal with, is this bill of *Dreyfus* for £1000 and 2000 gold eagles, which were valued at between £8000 and £9000.

Now the *General Company* had had the £30,000 between the 3rd and the 16th. It had all been drawn when these securities arrived. The *General Company* was still carrying on its business. It is not pretended that they stopped payment or closed their doors before the 17th. There seems to be some uncertainty whether they opened their doors on the 17th or not; but certain it is that on the 17th, either by not opening their doors

in the morning, or by closing them in the course of the day, they did stop payment. On the 16th of March, the bill of exchange in question having been received, and the bill of lading of the gold having been received, Mr. *Schwank*, it appears, waited upon the *Anglo-Peruvian Bank* and said he had received these remittances and many others, and, as it were, he held out his hand and said, "We owe you £30,000: which of these securities will you select to reimburse you?" There were other bills received by the *General Company* besides *Dreyfus's* bill for £1000, and therefore it seems, as far as this *Bank of Lima* is concerned, the property was selected by Mr. *de Gessler* (which is one of the great points I have to advert to afterwards), who had originally been one of the managers of the *General Company* and who ceased to be so about two years before this transaction took place, and had now become the general manager of the *Anglo-Peruvian Bank*. Mr. *Schwank*, therefore, acting as trustee in pursuance of the resolution of the 3rd, came to Mr. *de Gessler*, and Mr. *de Gessler* selected *Dreyfus's* bill and the bill of lading for the gold. Accordingly, on the morning of the 16th, it was handed over to the *Anglo-Peruvian Bank*, that is, to their managing director, Mr. *de Gessler*, who is the same as the bank, and therefore there were handed over to the bank the bill of lading for the gold and *Dreyfus's* bill for £1000.

Something was said by Mr. *Glasse* as to *Dreyfus's* bill not being accepted. I do not think that makes any difference; because I believe it is quite consonant with mercantile usage to sell a bill which has not been accepted, and which is readily marketable when the drawer or indorser is a good man. In the present case, the *Bank of Lima* being well known, and in high credit no doubt, and *Dreyfus* being well known, and having a very large house in *Paris*, they knew that the *Bank of Lima* would not send a bill which *Dreyfus* would not accept; and, even if *Dreyfus* did refuse acceptance, they had the indorsement of the *Bank of Lima*, and they had also the liability of the drawer whoever he was. Therefore, that such a bill should be the subject of dealing in the mercantile world does not in the slightest degree deviate in any point from ordinary usage. They selected the bill and the gold.

Now, apart from the question which Mr. *Glasse* and Mr. *Kekewich* have argued as to notice, what was this transaction? The *Bank of*

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*Lima* had selected the *General Company* as their agents, and they had unbounded confidence in them. The question I have to decide is not whether the *General Company* were justified in doing what they did. If I had to decide that, I should probably decide that they were not justified; for I am quite satisfied that they would not have adopted the course they did unless they had been under pressure. They were under pressure we know. We know very well from experience that mercantile houses, under pressure, will do things which they would not otherwise do. That the *General Company*, therefore, were very much under pressure at this time, and that they deviated from the general course of dealing by discounting the bills before they were received, I think would admit of no doubt, and I should have very little hesitation in deciding that the *General Company* were wrong in what they did. But I repeat, the question I have to decide is this, not whether the *General Company* were wrong, but whether the transaction is one that deprived the *Anglo-Peruvian Bank*, who paid value for this property in anticipation of its arrival, of the right to the proceeds of the property when it did arrive. That, I think, is the only question I have to decide with regard to the transaction.

First, then, with regard to the question of the bill, nobody can possibly dispute that if the money had been obtained on the 16th the *General Company* were in a situation to deal with *Dreyfus's* bill on that day, and if they had handed it over to the *Anglo-Peruvian Bank* in consideration of the price of the bill then paid, nobody can doubt for a moment that the *Anglo-Peruvian Bank* would have acquired a good title to it. So, with regard to the gold, cases were cited to me; but the law is now perfectly settled that a bill of lading is an indication of property, and delivery of a bill of lading for value passes the property unless it is obtained by fraud or in any improper manner, for then the property does not pass; and it was so laid down in *Shepherd v. Harrison* (1), in the House of Lords, and the case cited before me, in which, a short time ago, I had occasion to decide, in accordance with the decision in the House of Lords, that where a bill of lading of some timber from *Sweden* was received by a house in *London*, and a bill was sent for acceptance at *Hull*, and the *Hull* merchant

(1) Law Rep. 5 H. L. 116.



thought fit to retain the bill of lading, but refused to accept the bill, I decided there, having the decision of the House of Lords for my guide, that when a bill of lading and acceptance to cover the value are sent, and the person to whom they are sent refuses to accept, he cannot retain the bill of lading. The House of Lords decided, under precisely similar circumstances, where a bill of lading was retained and the bill was refused, that although generally possession of the bill of lading passes the property, yet, if it is improperly obtained, the property does not pass. Therefore it was decided in that case that *Shepherd & Co.*, having refused to accept the bill, did not by the retention of the bill of lading acquire any property. That is very distinctly laid down by all the noble and learned Lords who decided that case, and particularly in the latter part of Lord *Cairns'* judgment. The general proposition that a bill of lading passes the property has been long settled. One of the cases cited on the present occasion on that subject is *Coventry v. Gladstone* (1), where that doctrine is expressly laid down. Therefore the bill of lading represents the property, and has precisely the same effect, I apprehend, as if, instead of its being a large box containing 2000 American eagles, which must have been of very great weight, it had been a box containing a diamond worth as much money, which had been placed in the hands of Mr. *de Gessler*. The bill of lading, therefore, passes the property to the *Anglo-Peruvian Bank*, unless it was improperly obtained.

Now, was it improperly obtained? This is a case of principal and agent. The *Bank of Lima* are the principals and the *General Company* are the agents. If one firm, the *Bank of Lima*, will place unbounded confidence in their agents, as I think they were warranted in doing in this case, will trust them with their bills, will trust them with their gold, there ought to be the very strongest case to deprive those who deal with agents, of the property which they acquire in the course of such dealing.

Now, apart from the question of Mr. *de Gessler* having been connected with the *General Company*, was there anything in this transaction which could deprive the *Anglo-Peruvian Bank* of the right to this property which they bought of the *General Company*

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when it arrived? It is perfectly clear by the law of this Court, that property in expectancy can be the subject of bargain and sale, and mercantile dealing, or anything else, just as much as property in possession; and apart from the particular circumstances of this case, here is one mercantile firm who says to another, "We are under pressure and shall be so until the 17th inst.;" they write that on the 3rd—that is fourteen days—"We shall be under pressure. We shall have certain property coming to us not later than the 17th, and if you will let us have £30,000, the property which we shall then have we will hand over to you. Is there anything improper in such a course of business? There is nothing unfair and nothing dishonest; it is perfectly according to mercantile usage and according to trade that those who expect property and have not got it in possession may make it the subject of a money arrangement. In the transaction itself, therefore, there was nothing improper on the part of the *Anglo-Peruvian Bank*, who do not seem to me to have deviated from propriety and mercantile dealing in this transaction. There happened to be among the directors of the *General Company* a gentleman of the name of *Lazzarraga*, a very wealthy man, it is said, residing in *Paris*. In order to make themselves doubly sure they take from him a guarantee that the £24,510 from the *Banco del Ecuador Guayaquil* shall be forthcoming, and so far as the same is not forthcoming he shall make it good. The £24,510, it seems, did come—at all events the debt to the *Anglo-Peruvian Bank* was paid, and Mr. *Lazzarraga* was at once released.

Now, therefore, if the gold had been the absolute property of the *General Company*, and the bill of exchange the same, their receiving the price of it in anticipation before it arrived was perfectly regular, and the property would go to the *Anglo-Peruvian Bank*.

Then, were the *Anglo-Peruvian Bank* justified in treating the *General Company* as the owners of this property? If the *General Company* were the owners, the question cannot admit of the slightest doubt. There is nothing to discuss, because if they had been the owners of the property, there was no objection to their pledging their property before it arrived. It is the right of every man to do so. It would be a grievous hardship if a man

who had a large property coming to him in fourteen days must dishonour his paper because he cannot get an advance before the fourteen days. Therefore if the *General Company* are to be treated as the owners of the property which they expected to receive from the *Bank of Lima* on or before the 17th, there is an end to all question between the parties. Now, if it were a question between the *Bank of Lima* and the *General Company*, undoubtedly the *General Company* were not the absolute owners. They had only the qualified ownership. But had they the property? I suggested to the learned counsel the question where was the property in this gold and in the bill between the 3rd and the 16th. I was rather under the impression at one time, until I further considered it, that the property would remain in the *Bank of Lima*. But considering the course of dealing, I am of opinion it must be considered that when the bill of lading was posted at *Lima* it became the property of the assignees. The property in a shipment becomes the property of the consignees when the shipping takes place and the bill of lading is forwarded. Therefore, as this gold was shipped, and the bill of lading was forwarded to the *General Company* for that which I must consider value, namely, the course of dealing between the parties to protect them from a liability they had incurred for the *Bank of Lima*, as between the *Bank of Lima* and the *General Company*, I must consider for this purpose that the bill of exchange, and also the gold by the transmission of the bill of lading, was the property of the *General Company*. The *General Company* undoubtedly ought not to have dealt with the property except as covering the remittances; therefore it becomes very material to decide what was the state of the accounts between the *General Company* and the *Bank of Lima* on the 3rd of March. It appears from the evidence that on the 3rd of March the *General Company* had in hand from the *Bank of Lima* a balance of rather more than £20,000, and I must take that to be £20,000 in money, because, considering they were under pressure, there can be no doubt that every available bill had been discounted, everything had been turned into money. Therefore they had in hand in cash upwards of £20,000. On the 16th they received bills to the amount of £5000, that is, *Dreyfus's* bill for £1000 and bills for £4000 besides, and gold eagles to the extent

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of £8000. That brought the balance on the 16th up to £33,000. Therefore, having £33,000 belonging to the *Bank of Lima* in hand, it could not have been right in the *General Company*, in my opinion, on the 16th to sell the golden eagles and pay a debt having no connection with the *Bank of Lima*. But it must not be lost sight of that although they had in hand a balance of £33,000 on the 16th, they were liable upon bills for nearly £28,000 falling due on the 18th, so that in two days the balance, if they had gone on, of £33,000 would have been reduced to a balance of £5000. So, considering that they were liable to pay that, the balance was not so overwhelming in favour of the *Bank of Lima* as to render it improper for them to deal with the property generally.

It appears to me that as between the *Bank of Lima* and the *General Company* the effect of the contract of April, 1871, acted upon for four years, was to make all the bills remitted to the *General Company*, as between those two parties, the absolute property of the *General Company* for the purpose of dealing with them as they thought fit; and if anything was done wrong, it is one of those cases in which the wrongful act of the agent must fall upon the principal who has authorized him to act.

I have already stated that in my judgment there was nothing wrong in the transaction itself on the part of the *Anglo-Peruvian Bank*; therefore the difficulty is endeavoured to be got over by the doctrine of notice. Mr. Glasse and Mr. Kekewich have strenuously contended that there was in this case notice to the *Anglo-Peruvian Bank* which deprives them of the right to hold this property, and they endeavour to make out notice; thus, Mr. de Gessler and Mr. Wheelock were originally the managers of the *General Company*, and they were the managers when this arrangement of April, 1871, was entered into, and Mr. de Gessler is one of the agents who signed the document and made that arrangement. Mr. de Gessler continued to be the general manager, or one of the general managers, from 1871 to 1873, when he ceased to be the manager of the *General Company* and became the manager of the *Anglo-Peruvian Bank*, and it was through him that this arrangement was made in 1875. Now, it is contended that, inasmuch as Mr. de Gessler knew of the arrangement of 1871, although he had ceased to be the manager of the *General Company* for two years,



he was bound to bear in mind what that arrangement was, and to remember everything about it; and not only that, but to go into the question of the general account between the *Bank of Lima* and their agents, the *General Company*. I think myself that would be carrying the doctrine of notice to a very dangerous extent. It was said by the Lord Chancellor in *Ware v. Lord Egremont* (1): "I must not part with this case without expressing my entire concurrence in what has on many occasions of late years fallen from Judges of great eminence on the subject of constructive notice, namely, that it is highly inexpedient for Courts of Equity to extend the doctrine—to attempt to apply it to cases to which it has not hitherto been held applicable." I think if I were to say that where a gentleman who had been manager of one company for three years after a transaction had taken place, and had then ceased to be so for two years, and became the agent of another company, the other company to which he became the agent is bound by all the knowledge that he once possessed, and that he, as their agent, was bound to recollect all the minute arrangements of the documents which he is not in possession of and which are not accessible to him; and also to go into the general account between principal and agent arising out of this transaction, it would, in my opinion, be carrying the doctrine of notice to a most inconvenient and dangerous extent. It has often been said, and the celebrated decision of Lord *Hardwicke* was referred to as to the doctrine of notice, that it must be not at a distant period, but in the same transaction. We cannot expect a person to remember the minute effect of transactions long ago.

Mr. *Glasse* said, although Mr. *de Gessler* did not remember and did not know this, he ought to have made inquiry. What inquiry ought he to have made? Was he called upon to go to the agent of the *General Company* and say, "What is the state of account between you and the *Bank of Lima*?" It seems to me that there was no such obligation imposed upon him. This company was a flourishing company, as I understand, and in high credit. It does not seem to me that it was so much deviating from the ordinary course of business in seeking an advance of money from the 3rd of March to extend over fourteen days, as that the *Anglo-Peruvian Bank*,

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(1) 4 D. M. &amp; G. 473.

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by themselves or their agents, were called upon to make any inquiry as to the state of accounts between the *Bank of Lima* and their agents, the *General Company*. I cannot, therefore, think that the doctrine of notice (and I believe it rests upon Mr. *de Gessler's* notice only) can be extended to this case.

Upon the whole, therefore, I come to the conclusion that the transaction was not irregular, and was not improper. I am only now speaking of the question as between the *Bank of Lima* and the *Anglo-Peruvian Bank*. I must say it was irregular and improper as between the *Bank of Lima* and the *General Company*. It was wrong. I think they ought not to have dealt with the property as they did. But as between the persons who deal with the *General Company*, I think it is one of those cases in which confidence has to a certain extent been betrayed, but it has not been betrayed under such circumstances as to call upon those who are dealing with the *General Company* to make any inquiry. Therefore I am of opinion that by paying the price in advance—because it is not denied that they paid the price of the gold and they paid the price of the bill—all that can be said is that they paid it in advance; they paid it on or before the 16th; by paying the price of the gold they would be entitled to the bill of lading, and by paying the price of the bill they would be entitled to all. I have given great consideration to the case, but I am unable to satisfy myself that there is any ground upon which I can come to the conclusion that that was such an irregularity as put the *Anglo-Peruvian Bank* upon any inquiry whatever, and I cannot impute to that bank any knowledge which Mr. *de Gessler* had at a former period.

I am of opinion, on the whole, that the case of the Plaintiff fails. I am of opinion that by delivery of the bill of lading on the 16th, and by delivery of the bill of exchange, a good title was acquired by the *Anglo-Peruvian Bank*; therefore the case of the Plaintiff impugning their title fails; the consequence of which is that the bill must be dismissed.

I am glad to find that this question will not be very important to the *Bank of Lima*, because I am told by the official liquidator that they have already received 7s. in the pound, and there is a further dividend of 2s. in hand for them. Besides which Mr. *Cape*

says that there is every prospect of all the debts of the *General Company* being paid in full. What I propose to do is to dismiss the bill with costs as between the *Bank of Lima* and the *Anglo-Peruvian Bank*, but without costs as against the *General Company*, because I think they have been guilty of impropriety. The costs of the *General Company* will be costs in the liquidation.

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Solicitors: *Freshfields & Williams; Norton, Rose, & Co.*

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CHATTOCK v. MULLER.

[1876 C. 406.]

*Agreement—Uncertainty—Agency.*

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Feb. 26, 27;  
April 10.

The Defendant purchased an estate, having agreed with the Plaintiff that, if he made the purchase, he would cede part thereof to the Plaintiff.

There was some uncertainty in the memorandum of agreement between the Plaintiff and Defendant as to the exact portion which was to be ceded to the Plaintiff.

In an action by the Plaintiff for specific performance of the agreement,

The Court directed a reference to Chambers to ascertain what portion the Plaintiff was entitled to, and decreed that the Defendant should convey such portion to the Plaintiff.

IN June 1876, an estate called the *Kitswell* estate, in *Hertfordshire*, was offered for sale by auction, in two lots, consisting of 129 acres and 63 acres respectively.

Statement.

The Defendant, whose estate immediately adjoined the property, made the acquaintance of the Plaintiff a few days before the sale, and having heard that the Plaintiff was intending to purchase the property, and was willing to give £23,000 for it, said he could get it much cheaper, and invited him to come to his house, as he himself desired to purchase the part of the property which touched upon his own estate.

Accordingly, on the 20th of June, the Plaintiff went to the Defendant's house, and the Plaintiff produced a written statement of the part of the property which he desired to have, being the house and about eighty acres which were on his side of a brook running through the *Kitswell* estate; and a memorandum was drawn up by the Defendant in his own hand writing, by which it

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was agreed that if the Defendant purchased the whole estate, or lot 1, he would cede to the Plaintiff certain fields which were there specified, and also "lot 13, that part of the lower park and plantation bounded on the south by lot 19, and on the north by the brook, containing about twenty acres—the acreage of lot 13 to be ascertained." And by the same memorandum the mode of ascertaining the price to be paid by the Plaintiff for the part ceded to him was arranged.

The Defendant marked with a pencil on the plan the boundary of the part which he wished to have, but it was not then settled who was to bid at the auction.

A few days later it was arranged between the Plaintiff and the Defendant that the Defendant should bid at the sale and the Plaintiff should not.

The Defendant stated that the final agreement was that if he purchased lot 1 only he should cede part to the Plaintiff, but if he purchased the whole he should deal with the estate as he pleased. The Court did not consider that this stipulation was proved to have been made.

At the auction on the 27th of June, the property was bought in at the reserve price, the highest bid being £19,500.

It was proved that the Plaintiff and Defendant met soon afterwards, and the Plaintiff said, "I suppose our arrangement will hold," and the Defendant said, "Certainly, but we must lie by, for the owner will come to us."

The evidence shewed, in the opinion of the Court, that an arrangement was then come to that the Defendant should buy the property if he could by private contract, and that in that case the Plaintiff should have the mansion-house and the eighty or ninety acres he wanted.

On the 3rd of July the Defendant wrote to the Plaintiff: "As this estate was not sold at the auction and is now to be sold in one or two lots, I propose to make an offer unless I hear from you in a post or two." And on the 4th of July the Defendant wrote to the Plaintiff to say that he had had an offer from the auctioneer, and that the terms had been lowered; he added, "I have held off more in your interest than in mine, but you are of course quite at liberty to offer for the property."



Thereupon the Plaintiff wrote to the Defendant to say that after the Defendant's letter he would not think of making a bid, or interfering in any way, and asked that he might hear from the Defendant when he had anything to say.

On the 14th of July the Defendant concluded a treaty to buy the property for £19,500, and wrote the next day to the Plaintiff, "I closed the purchase of *Kitwells* and signed the agreement yesterday."

And this letter was answered by the Plaintiff expressing his approval of the terms, and adding, "I will meet you at any time you like to arrange for my purchase from you."

On the 20th of July the Defendant wrote to the Plaintiff to say he had not made up his mind as to *Kitwells*, but would write as soon as he decided on dividing the estate for the purpose of sale, to which the Plaintiff answered, offering to save the Defendant all trouble as to dividing the estate, and to take over the whole purchase except the forty-seven acres next the Defendant's estate.

On the 25th of July the Defendant wrote to say he had made up his mind not to sell any part of the estate, but intended to keep it for his son, and added, "In my agreement with you I reserved to myself the right to deal with the property as I liked in case I purchased the whole."

The Plaintiff was examined *vivâ voce* and was not cross-examined, and no evidence was called on the part of the Defendant.

*Higgins, Q.C., and Whitehorne, for the Plaintiff:—*

This case comes distinctly within the authority of *Heard v. Pilley* (1); *Cave v. Mackenzie* (2). By these cases *Bartlett v. Pickersgill* (3) is overruled. The only difference is that here the Defendant was to buy a part of the property for the Plaintiff, and not the whole.

[MALINS, V.C., mentioned *Gregory v. Mighell* (4) as to apportioning the price.]

There was a similar agency, though it took the form of a trust

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(1) Law Rep. 4 Ch. 548.

(2) 46 L. J. (Ch.) 564.

(3) 1 Cox, 15.

(4) 18 Ves. 328.

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in *Booth v. Turle* (1); *Lees v. Nuttall* (2). No doubt it is only part of the estate which the Defendant holds as trustee for the Plaintiff, but "that which can be rendered certain is certain." In his last letter the Defendant repudiates the contract, and this is such an acknowledgment of the existence of the contract as to enable the Court to enforce it: *Bailie v. Sweeting* (3).

*Glasse*, Q.C., and *Kekewich*, Q.C., for the Defendant:—

Assuming that there is agency, the terms of the agency are not defined. The dividing line between the part to be purchased by the Defendant for himself and for the Plaintiff was not settled. The *Statute of Frauds* applies, and the agreement is void for uncertainty. For what amount is a decree to be made? Can a person be held to be an agent for another as to an unascertained quantity of an estate.

[MALINS, V.C.:—It may be that, as the Plaintiff has been lulled into false security by the Defendant's conduct, the proper relief would be to give the Plaintiff the whole estate.]

*Higgins*, in reply:—

The Defendant was our trustee as to the mansion-house and eighty or ninety acres of land, and that is certain which can be rendered certain: *Owen v. Thomas* (4); *Haywood v. Cope* (5).

[At the close of the arguments the Vice-Chancellor intimated his opinion that the Defendant had lulled the Plaintiff into not making an offer for the estate; that the letter of the 4th of July was conclusive that the Defendant was all the time leading the Plaintiff to believe that if he bought the property the Plaintiff should have the part he wanted. Otherwise he ought to have told the Plaintiff not to rely upon him, and that if he wanted any part of the estate he must bid in competition with him; and that having, so to speak, warned the Plaintiff off from the purchase, the Defendant was, in his opinion, no longer at liberty to change his mind; that there was clearly an arrangement that the Defendant

(1) Law Rep. 16 Eq. 182.

(3) 9 C. B. (N.S.) 843; 30 L. J.

(2) 1 Russ. & My. 53; 2 My. & K. (C.P.) 150.

819.

(4) 3 My. & K. 353, 356.

(5) 4 Jur. (N.S.) 227.

was to buy the estate so far as he wanted it, for himself, and so far as he did not want it, for the Plaintiff; so that if the agreement had been to buy the whole estate for the benefit of the Plaintiff, the Defendant could not have bought it for himself, he would have been a trustee, and the *Statute of Frauds* could have had no application even if that defence had been otherwise open. But he reserved his judgment, on the defence that the agreement did not point out accurately the boundary of the portion which was to belong to the Plaintiff.]

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April 10. MALINS, V.C., after recapitulating the facts, continued:—

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It is clear that the Defendant attended the auction partly on his own account and partly as the Plaintiff's agent, and if he had then purchased the estate, he must have been held to be a trustee for the Plaintiff of the house and the eighty or ninety acres which it had been arranged that he should have. The subsequent negotiations were treated as carried on by the Defendant on behalf of himself and the Plaintiff, and he treated the purchase as a joint purchase in various letters until the 25th of July, when he appears to have become enamoured with the estate, and astonished the Plaintiff by his letter of that date, in which he assumed to be the owner of the estate, part of which he had unquestionably purchased as the agent of the Plaintiff. This was a flagrant breach of duty, which in this Court has always been considered as a fraud: *Lees v. Nuttall* (1); *Heard v. Pilley* (2); *Booth v. Turle* (3); *Cave v. Mackenzie* (4).

But it was strongly argued by Mr. Glasse and Mr. Kekewich, for the Defendant, that the Plaintiff cannot have a decree because there was no certainty as to what part of the estate the Plaintiff was to have, or as to the price to be paid for it. In a case like this, where the Defendant has acquired the estate or part of it by a fraud on the Plaintiff, I think that the Court would be bound, if possible, to overcome all technical difficulties in order to defeat the unfair course of dealing of the Defendant, and I should not, in my opinion, be going too far if I compelled the Defendant to

(1) 1 Russ. & My. 53; 2 My. & K. (2) Law Rep. 4 Ch. 548.  
819. (3) Ibid. 16 Eq. 182.

(4) 46 L. J. (Ch.) 564.

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give the whole estate to the Plaintiff at the price given for it, rather than that he should succeed in retaining it on account of any uncertainty as to the part which the Plaintiff is entitled to have. But I think the memorandum in the handwriting of the Defendant, which was given to the Plaintiff at the interview of the 20th of June, relieves the Court in this case from any difficulty. [His Lordship then referred to the memorandum, and continued:—]

This shews every plot of land which the Plaintiff desired to have, and which it was agreed he should have, by a reference to particulars on the plan accompanying the conditions of sale, and the only part as to which there is the least uncertainty is the plot No. 13, of which the Defendant was to have about twenty acres; but as that part is described by boundaries, there will be no difficulty in ascertaining exactly what the Plaintiff is to have, the house and eighty acres of land, which was what he said throughout that he wanted. The same document affords the means of ascertaining the price per acre to be paid by the Plaintiff and Defendant for what each takes, and if it did not, the case of *Gregory v. Mighell* (1) is an authority to shew that in a case like the present the Court will do its best to ascertain what the agreement leaves uncertain. The Plaintiff has offered to relieve the Defendant of lot 2 at the price which the Defendant gave for it, and he must do so if the Defendant desires it. There will be a reference to Chambers to ascertain the exact boundaries of the part of lot 13 which the Defendant is to retain, and the price to be paid by the Plaintiff for the part which is to be conveyed to him. The Defendant must pay to the Plaintiff the costs of the action.

Solicitors for Plaintiff: *Vallance & Vallance.*

Solicitors for Defendants: *Freshfields & Williams.*

(1) 18 Ves. 328.



*Ex parte* RAILWAY STEEL AND PLANT COMPANY.

V.-C. H.

*In re* TAYLOR.

1878

*In re* WILLIAMS.

Feb. 18.

*Winding-up of Company—Proceedings of Creditor—Judgment and Execution—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 84, 87, and 163—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 87—Judicature Act, 1875, s. 10.*

8th D  
537  
11th D 170  
16th D 34  
20th D 46  
449  
9th D 60

A company was sued in an action under the *Bills of Exchange Act*, and the Plaintiff, in consequence of repeated applications by the secretary and solicitors of the company, postponed proceedings in the action, and ultimately signed judgment and issued execution; a petition for winding up was presented, on which an order was afterwards made; the creditor lodged the writ on the day of presentation of the petition, and on the next day the sheriff seized and was in possession:—

*Held*, that the postponement of the proceedings in the action having been caused by the applications made on behalf of the company for time, the creditor was entitled to the benefit of his judgment in priority to other creditors:

*Held*, also, that the right of the execution creditor was not affected by the 10th section of the *Judicature Act*, 1875.

Form of order.

In an action by another creditor, also under the *Bills of Exchange Act*, the company obtained leave to appear and defend, on the ground that there had been irregularity in regard to the bill of exchange, and that the Plaintiff had not paid the full amount for it. On application for further time to proceed with the defence, statements were made *bonâ fide* by the solicitor's clerk as to the solvency of the company and the improbability of a winding-up petition, and further time was given, and ultimately, the orders not having been complied with, the action proceeded. Two days after the presentation of the petition judgment was signed in the action and execution issued:—

*Held*, that the creditor was not entitled to the benefit of his judgment, and that he must come in and prove his claim in the winding-up.

CHARLES DE HOFFMAN, who had a house in *Westminster* but was now residing in *Vienna*, was in August, 1877, indebted to *Henry Ramsay Taylor* in a sum exceeding £5000 for money lent to or paid for him; and being so indebted, he, on the 16th of that month, proposed to hand and indorse bills of exchange drawn by him upon and accepted by the *Railway Steel and Plant Company, Limited*, for £5000, and in consideration that *Taylor* should pay £3000 in cash, and also release and give up to him securities and claims which he held for £1320, part of his liability. *Hoffman*

Statement.

*Bank of London & South Western Bank, 20th D 44, &c.*

V.-C. H.

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said that the bills were drawn by him and accepted by the company in pursuance of a contract into which he had entered with them under these circumstances: he had entered into a contract with Baron *Henkel* for the purchase of an estate in *Austria*, including a concession for the construction of a railway which was intended to connect *Wolfsberg* with *Vienna*, and one of the terms was that *Hoffman* was to pay a deposit of £25,000, and some extra sums and interest, and he stated that all the necessary arrangements had been made to purchase the estate subject to the payment of the deposit. He then entered into a contract, subsidiary to the other, with the *Railway Steel and Plant Company*, whereby he bound himself to take from them a large quantity of steel rails for the railway at a high price, and in case he should fail to take from them the stipulated quantity, he was to forfeit to the company, by way of penalty, the sum of £10,000, and in consideration thereof the company had by the same contract agreed to provide for him in cash the said deposit of £25,000; but the company, he said, afterwards induced him to vary the contract and take their acceptances in lieu of cash, as they could not find it, and he was to procure such acceptances to be discounted and with the proceeds pay the deposit. He informed *Taylor* that the bills to the amount of £5000 were part of the acceptances, and in the belief and on the faith of the statements being correct he agreed to advance money. The £5000 was made up by three bills for £2000, £1500, and £1500. They were drawn by *Hoffman* on the 15th of August, 1877, and accepted by the company, being made payable at three months after date. *Taylor* paid £3000, and delivered up securities for £1320. *Hoffman's* funds deposited at a bank in *Vienna* were attached, and the attachment was retained until the acceptances for the £25,000 had become due. The bills were dishonoured in *London* by the company, and proceedings were commenced against *Hoffman* for breach of contract. The bills in *Taylor's* possession became due on the 17th of November, 1877, but at the request of *James Parker*, who was the secretary of the company, he agreed to delay the presentation of them.

On the 19th of November application for payment was made to the company's bankers in *London*. Between that date and the

date of the writ *Parker* several times requested *Taylor* to wait for payment, in order that he might carry out arrangements for meeting the bills, and those requests were complied with. The writ in the action, *Taylor v. Railway Steel and Plant Company* [1877 T. 745, Q. B.] (transferred by order dated the 2nd of February, 1878), commenced under the provisions of the *Bills of Exchange Act*, was issued on the 4th of December, 1877, and on that day *Parker* called upon *Taylor* and said that financial arrangements were in progress, and that in a few days the bills would be paid off. When *Taylor* declined to wait any longer, and issued the writ, he told *Parker* it would be sent down to *Manchester* for service upon him as secretary, or upon a director; *Parker* begged him not to injure the credit of the company by doing that, but to allow it to be served upon him in his office there and then, and he assented to the request solely from motives of consideration towards the company, and it was served by his clerk in his office. On the 14th of December the Plaintiff's solicitors reminded *Parker* that judgment would be due on the 16th, and on the 19th they told him that they must proceed in the ordinary way. *Parker* begged for further time, and on the 27th of December did so again, and his requests were complied with. On the 16th of January, 1878, judgment was signed, and a writ of *fi. fa.* against the goods of the company was issued, and instructions were given to a clerk to lodge execution with the sheriff. The company's solicitors in *London*, by their clerk, after the writ of *fi. fa.* was issued, requested time, and it was granted.

On the 17th of January *Parker*, with the solicitors' clerk, called upon *Taylor* and asked for further time, and promised to call again on the 18th. That appointment was not kept, and *Taylor* wrote stating he would not delay. On the 19th creditors were induced by the company to present a petition for a winding-up order, and on the 21st it was presented. On that day the writ of *fi. fa.* was lodged with the sheriff, and on the 22nd he seized, and *Taylor* stated that but for the representations and assurances so made and given to him by *Parker* and by the solicitors' clerk, the writ of *fi. fa.* would have been lodged with the sheriff on the 18th of January. On the 22nd a copy of the petition was served upon *Taylor*, and notice given that on an *ex parte* application of certain

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creditors an injunction had that day been granted to restrain the sheriff from selling the goods until the hearing of the petition or further order, and provisional liquidators appointed.

There was evidence shewing that the company had a large surplus of assets, and that securities which they held for a large debt could not be made available on the 18th or 19th of January. Also that the issuing of the writ in the action and the signing of judgment did not become known to the directors until the 19th of January. It was stated that there was a good defence to the action on its merits, the ground stated being that no consideration had been given for the bills. The order for winding-up the company was made on the 1st of February, 1878, and on the 2nd, on motion by the company and the liquidators, this and three other actions were ordered to be transferred to this Division.

Argument.  
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*Dickinson*, Q.C., and *Townsend*, for *Taylor*, moved, on notice, that the injunction granted on the 22nd of January might be dissolved, and that an inquiry might be directed as to what damages had been sustained by him by reason of the order, which the petitioners ought to pay, and that the petitioners and the company might be ordered to pay the costs of the motion. It was submitted that there was no contradiction of what *Taylor* had stated, and that his evidence clearly shewed that he had abstained from taking proceedings because of the requests made to him by *Parker*; also that where a judgment creditor had abstained, or been prevented by the acts of the company from issuing execution before a winding-up order had been made, the Court would put him in the same position as if he had not been induced to abstain; that *Parker*, on behalf of the company, and other persons who went to *Taylor*, induced him to act as he had done, and so far they prevented him from having the fruits of the judgment which was properly obtained. It was clear that *Parker* got friendly creditors to present a petition for winding-up the company; and they now asked that *Taylor*, notwithstanding the winding-up order and the appointment of provisional liquidators, might be allowed to realize his execution, and that there might be an inquiry for damages, and that all the expenses of keeping the sheriff in possession, and interest to which he was entitled



upon his judgment debt, might be paid, and for costs of this motion, and they would ask that the motion of the company should be refused with costs.

*Robinson*, Q.C., and *Heath*, for the official liquidators, opposed the motion; and also moved on their behalf that the judgment signed in the action might be set aside; that the company might be let in to defend the action, and that the costs of the motion might be costs in the action; stated that the secretary had concealed from the directors the facts that the writ had been issued, and that the action was pending, and that not one of them knew of it.

[HALL, V.C.:—I cannot allow it to be contended that the company did not know of what was going on.]

The writ was served upon the secretary in Mr. *Taylor's* office in *London*. After the petition was presented on the 21st of January, the writ of *fi. fa.* was lodged with the sheriff, and the goods were seized the day following. The 163rd section of the *Companies Act*, 1862, makes the execution absolutely void: *In re Universal Disinfectors Company* (1); *In re London and Devon Biscuit Company* (2); *In re Bastow & Co.* (3); and *In re Hill Pottery Company* (4). As the sheriff had not actually entered into possession before the petition was presented, *Taylor* ought not be allowed to proceed with his execution.

[HALL, V.C.:—Even where the directors of a company, the creditor being in a position to realize, have said in effect, “do not do that, we know you can do us an injury and stop our works, but give us time,” thus persuading the creditor not to do that which they unquestionably knew he would have done, viz., proceeded to realize.]

All that might give a right to the creditor to go against the directors personally for damages, but it would be unfair towards the other creditors of the company if he had a preference against the assets.

The 10th section of the *Judicature Act*, 1875, has a material

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(1) Law Rep. 20 Eq. 162.

(2) Ibid. 12 Eq. 190.

(3) Law Rep. 4 Eq. 681.

(4) Ibid. 1 Eq. 649.

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bearing upon the rights of judgment creditors, as it enacts that in the administration of assets in the winding-up of any company, the same rules shall prevail as to the rights of secured and unsecured creditors as may be in force under the law of bankruptcy; and all persons who would be entitled to prove and receive dividends out of the assets of the company, may come in under the winding-up of the company and make their claims.

[HALL, V.C.:—Does that section do more than introduce the rule of administration in bankruptcy?]

It was in effect the 87th section of the *Bankruptcy Act*, 1869. (32 & 33 Vict. c. 71), and the object of it was to place the secured creditor in the same position as an unsecured creditor in bankruptcy, and no wider rights should be given to *Taylor* than he would have had had he been a judgment creditor in a bankruptcy.

[HALL, V.C.:—I do not think that “secured creditor” means a creditor in the position of *Taylor*, who had obtained judgment and did not avail himself of it.]

The winding-up was actually going on, and the 10th section of the *Judicature Act*, 1875, was applicable. But even supposing the Court should think it right to allow the execution to go on, there ought to be an inquiry as to whether the transaction between *Taylor* and *De Hoffman* was legitimate, seeing that he paid only £3000 in cash, and gave up some securities for bills of the value of £5000, and therefore the Court should say that judgment in the action was not properly obtained; that the company might have a good defence to the action, and that *Taylor* ought not to be allowed to proceed with his execution. But if that should not be granted, then the Court should make an order similar to that made in *In re Hill Pottery Company*, that was to say, let the sheriff give up possession, and let the liquidators be at liberty to sell so much of the goods as would realize sufficient to pay the debt due to *Taylor*, and let the money be brought into Court and carried to a separate account. If the liquidators should not sell within a reasonable time, an application could be made in Chambers by *Taylor* to have the conduct of the sale. The sheriff need not remain in possession, as there would be amply sufficient

to pay every creditor: *In re Plas-yn-Mhowys Coal Company* (1). The costs of realization would be much more by the sheriff than by the liquidators, who would have the interest of all parties fairly before them.

HALL, V.C., after stating that the assets seemed to be much more than sufficient to pay the creditors, and that all that *Taylor* could require was to have his security not prejudiced, to have a speedy realization, and that it was unimportant to him whether the sale was by the sheriff or liquidators, so that he retained his first charge, continued :—

It appears to me that this particular case forms an exceptional one in favour of the creditor being entitled to have the benefit of his judgment and execution, notwithstanding the provisions of the *Winding-up Act* of 1862, s. 163, which make an execution after a petition for a winding-up void. It has, however, been clearly settled that it is not to be taken as being absolutely void, but it is to be taken in connection with the 87th section, thus leaving in the Court a discretion to be exercised. It is perfectly true that that is a discretion which makes it most difficult to find a case to apply it to; but it appears to me to be plain in this case that the creditor in question was one who could over and over again have realized his judgment and execution, had he not been persuaded not to do so by applications for indulgence made by the company. I say by the company, because I consider that they were made by the company, being made through the secretary of the company, and there were communications and letters, made and written by the solicitors of the company; but it is sufficient that they were made by the secretary of the company, who represented the directors of the company. Something has been said about the writ in this action not having been duly served upon the company, and of the ignorance of the directors as to the existence of the proceedings, but I consider there is nothing whatever in those suggestions. The writ was served upon the secretary of the company, who was the proper person to serve, though it was served upon him not at the office of the company, if that were necessary, ordinarily, though I do not know that it is, because he waived service on him

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at the office of the company by requesting that it might be served when he was seeing the creditor at his office in *London*, or somewhere else than at the office of the company. Everything seems to have been perfectly regular so far as the creditor is concerned, and being regular, his case, as I have already said, is entitled, as it appears to me, to be treated as being an exceptional one. I find that the same view was taken, and I see nothing to detract from it at all, by the Vice-Chancellor *Wood* in the case of *In re London Cotton Company* (1). There a creditor who wanted to enforce his execution, and was resisted in obtaining the fruits of his judgment, was allowed to proceed under the 87th section. Therefore I hold that Mr. *Taylor* is under the circumstances to be taken as being a preferred creditor, and as being entitled to be paid his debt. As regards the objection that under the provisions of the *Judicature Act*, 1875, his position is changed by sect. 10 of that Act, which assimilates the law of winding-up of companies as regards secured and unsecured creditors, to the law of bankruptcy; that section is inapplicable, in my judgment, to this case. The only remaining question, I think, which has been pressed upon me in this particular case, is whether I should not allow the realization to take place by the liquidators instead of by the sheriff. That, it is said, would be equally advantageous to this creditor, and more advantageous to the general creditors, by saving expense. Mr. *Townsend* has very properly said that this creditor's only object has been, and is, that he should be paid, and be paid with reasonable speed. As to that, it seems to me that some arrangement may properly be made, and therefore I propose to follow substantially the order made in the case which has been referred to, of *In re Plas-yn-Mhowys Coal Company* (2), the order being so expressed as that the creditor is to be considered not merely to retain the same rights, but as having been determined and adjudicated by me to be paid as if he had actually levied and sold, and to be taken to be in the same position as if he had realized or sold, and been paid out of the proceeds before the petition for the winding-up was presented. It has been argued that there is in this case ground for setting aside the judgment, and an application has been made for that purpose, and it is said in support of that

(1) Law Rep. 2 Eq. 53.

(2) Law Rep. 4 Eq. 689.



argument that Mr. *Taylor* is a creditor in respect of bills of exchange which were held by *Hoffman*, and that Mr. *Taylor* took those bills under circumstances which would disentitle him to hold them, except for a limited amount, and that therefore his claim ought to be cut down to that limited amount; hence, that there is a right to impeach the judgment, and that the company ought to be at liberty to defend the action. But Mr. *Taylor's* affidavit shews the circumstances under which he became the holder of the bills, *i.e.*, by paying £3000 in cash—and there is no question of his having paid moneys to that extent—and handing over securities by which he released £1325, which sum was substantially owing to him by the person who handed him the bills of exchange. I see no reason for saying that that was not equivalent to a payment to that person of an equal amount of cash, nor do I see anything in the evidence amounting to a breach of duty on the part of that person in respect of these bills which at all affects the case. The arrangement which *Hoffman* made with the company in reference to his being the holder of these bills is explained by the evidence. *Hoffman* was to be provided with a sum of £25,000 as deposit-money for the purchase of an estate near *Wolfsberg* and for the construction of a railway, for which the company were by their contract to supply the rails. I see no reason to suppose that *Hoffman* did not duly and properly deal with these bills as between himself and the company, and as between the holder of them (Mr. *Taylor*) and the company, if there was anything done by *Hoffman*, there is nothing which can be called in question, or which affects him as the *bonâ fide* owner of them, and I do consider that he is the *bonâ fide* owner of them, as he gave £4320 for bills of the nominal value of £5000, the difference between the two sums being apparently the discount. That seems to me to have been a perfectly legitimate transaction, and being so, I hold that there is no ground for setting aside the judgment and for giving leave to the company to defend the action. The motion for that purpose must be refused with costs; and as regards Mr. *Taylor's* execution, I hold that he is entitled to be paid the amount due upon the bills, and interest at 4 per cent.

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Declare, that the Court is of opinion that Mr. *Taylor* is entitled to the same

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charge on the assets of the company in the hands of the sheriff as if such assets had been sold by the sheriff under the writ of *fi. fa.* before the petition for winding-up the company was presented; and let the sheriff go out of possession and deliver the assets in his possession to the liquidators; and order the liquidators to sell forthwith sufficient assets to raise the amount due to Mr. *Taylor* in respect of the three bills for £5000, and interest at 4 per cent., and costs, and out of the proceeds of such sale pay Mr. *Taylor* the amount of his judgment debt, and interest at 4 per cent. thereon from the signing of the judgment, and costs, and the costs of both motions, and to pay the costs of the sheriff. Liberty to Mr. *Taylor* to apply in case the liquidators do not sell forthwith.

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*In re* WILLIAMS.

Statement.

*Reed Brothers*  
**ROBERT HAMILTON WILLIAMS**, on the 3rd of December, 1877, commenced an action [1877 W. 1716. Ex.] (transferred from the Exchequer Division by order dated the 2nd of February, 1878) to recover the sum of £1500, the amount of a bill of exchange which had been drawn by *Reed Brothers* upon and accepted by the *Railway Steel and Plant Company, Limited*, and not paid at maturity.

On the 14th of December the company obtained leave to appear, and an appearance was entered for them, to the writ of summons, which was served upon the secretary on the 4th of December, the allegation being that this was one of several bills amounting to £6500, for which no consideration had passed to the company.

On the 27th of December an application was made to a Master at Chambers to rescind the order giving leave to appear and defend, and to allow *Williams* to sign judgment for the amount indorsed on the writ; and after hearing arguments the Master ordered the company to pay £750 into Court within fourteen days, or give security. That order was not obeyed by the company. On the 10th of January, 1878, a clerk of the solicitors for the company applied for further time to pay the money into Court or give security. A clerk of the Plaintiff's solicitor attended the appointment and opposed the application on the ground that the company had other heavy liabilities, and that further time would prejudice the Plaintiff to a great extent, as a petition might in the meantime

be presented. For the company it was denied that there was any fear of a petition, as the company was quite solvent, and the Master gave five days' time, saying that the Plaintiff could not be prejudiced, as the company was solvent and would not run away.

On the 17th of January the solicitors for the company applied for further time, and the application was opposed. The Master asked if the company were solvent, and the reply was that they were, and could satisfy the claim, and also all other claims that could be made against them; that there need not be any fear of their presenting a petition; and that he thought, as clerk of the solicitors for the company, he was more acquainted with their solvency than his opponent could be, and, in fact, he thought that the company was about to settle the action or would soon give security. The Master asked him why they did not pay the money into Court, as they were so solvent, to which no reply was made; and upon that the Master made a peremptory order giving four days, saying that "after the statement by the solicitor for the company he could not see how the Plaintiff could be prejudiced."

On the 23rd of January the Plaintiff's solicitor received a letter giving notice that a petition had been presented and would be heard on the 11th of February, and that provisional liquidators had that day been appointed.

On the same day the Plaintiff's solicitor signed judgment for the amount of the bill and interest and costs (£1526 15s. 4d.), and issued a writ of *fi. fa.* and lodged it with the sheriff's agents, and the sheriff seized the goods.

On the 28th of January the Plaintiff's solicitor received notice that an injunction was granted on the 22nd of January, restraining the sheriff from selling the goods of the company till after the 1st of February, under the writ of *fi. fa.* of *Taylor*, and requiring the withdrawal of *Williams'* writ of *fi. fa.*

The company received notice from the drawers of the bills not to pay any of them, as they were suing for the recovery of the whole.

*Williams* stated that he had discounted one of the company's bills in August, 1877, which was paid at maturity; that he discounted the bill sued upon, paying at the time £925, and a further sum was to be paid by him at a subsequent time; and that he was still liable to pay that further sum. He knew nothing about the

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want of consideration, and he contended that the arrangements between *Reed Brothers* and the company did not affect him.

The order on the petition stated that it was made in the presence of several creditors, of whom *Williams* was one.

*James Parker*, the secretary of the company, stated that the property of the company was estimated to be of the value of £20,750; that the amounts recovered upon judgments under which the sheriff was in possession were £5010 19s. 2d., and £1526 15s. 4d. (*Williams*), together £6537 14s. 6d.

Argument.

*E. Cutler*, for *Williams*, moved for an order directing the sheriff of *Lancashire* to sell and realize the goods, &c., in his possession under a writ of *fi. fa.* dated the 25th of January, 1878, issued in his action; and out of the proceeds of sale to pay the expenses, and then pay *Williams* £1526 15s. 4d., with interest at £4 per cent. and all costs, or that *Williams* might have a charge on the property of the company for his debt and costs; and contended that *Williams* was entitled to have leave to go on with his execution now after the winding-up order, as he was before the presentation of the petition, as was done in *In re London Cotton Company* (1), *In re Great Ship Company* (2), and *In re Bastow & Co.* (3); where execution was not issued till after the petition was presented, and the Court refused to stay proceedings under it. These were distinct authorities which removed all objection that the judgment was not signed until after the presentation of the petition. It would, however, have been signed at an earlier date but for the statements made on behalf of the company. The cases of *In re Imperial Steam and Household Coal Company* (4) and *In re Universal Disinfecter Company* (5) could not be cited against *Williams*.

*Robinson*, Q.C., and *Heath*, for the liquidators, opposed the motion; and on motion by the company asked that the amount of the judgment signed in the Exchequer Division by *Williams* in his action for £1526 15s. 4d., on the 23rd of January, might be reduced to a judgment for the sum of £925 and costs only; or that

(1) Law Rep. 2 Eq. 53.

(2) 12 W. R. 139.

(3) Law Rep. 4 Eq. 681.

(4) 16 W. R. 689.

(5) Law Rep. 20 Eq. 162.



the judgment might be set aside and the company might be let in to defend the action, and that the costs of this motion might be costs in the action. They submitted that there was no possession by the sheriff before the petition. In any event *Williams* had not on his own statement paid more than £925 for the bill, and it was the duty of the company to take every means in their power to test the right of *Williams* to be paid what he claimed. The company believed that there were valid reasons for defending the action, and got leave to do so. The company ought not now to be required to pay the £750 into Court.

All the decisions, excepting *In re Bastow & Co.* (1), were against the claim of *Williams*, and they relied upon *In re London and Devon Biscuit Company* (2) and *In re Universal Disinfector Company* (3).

*E. Cutler*, in reply.

HALL, V.C.:—

It appears to me that this case is substantially distinguishable from the one which preceded it. Mr. *Williams*, being a creditor in respect of a certain bill of exchange for £1500, commenced an action under the provisions of the *Bills of Exchange Act*, and the company obtained an order giving them leave to appear and defend it. An application was afterwards made by Mr. *Williams* to discharge that order and for leave to sign judgment. That application was considered to be not frivolous and vexatious, but one which ought to be granted, but on terms. If the terms had been complied with the action would have gone on and been tried on its merits, as it was thought, apparently, that there was something to be investigated in the action before judgment should be signed for £1500, because it was a case where the Plaintiff had not advanced the whole of that sum. There being a disputed transaction between the person with whom Mr. *Williams* had dealt and the company, it was clear that there was something that should be investigated, and the Court therefore required the company, as

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(1) Law Rep. 4 Eq. 681.

(2) Law Rep. 12 Eq. 190.

(3) Law Rep. 20 Eq. 162.

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terms for being allowed to appear and defend, to bring into Court, within fourteen days, £750, one-half of the demand. The order so made to pay within that time was the price of the non-withdrawal of the leave granted to appear and defend. That sum of money was not forthcoming at the time fixed, and the company asked for and obtained an extension of time, and that was granted, and the extension was such as that it about fell in with the time when this petition was presented for winding up the company. Under these circumstances, putting out of sight for a moment all charges of alleged misrepresentation, the question is whether, under such circumstances, the creditor, pursuing his action in due course, and it not being, apparently, improperly or unduly delayed or frustrated, is to be allowed to say after the petition for a winding-up that he ought to be at liberty to issue execution, he having in fact signed judgment in the interval between the presentation of the petition and the appointment of provisional liquidators, and the order made for winding-up. Mr. *Cutler* has said that there is no apparent distinction in principle between the case of an applicant for liberty to issue execution, and who has signed judgment before the winding-up order is made, and an applicant who has signed it before the petition was presented—that there is no sound distinction, and that you must look at the circumstances of the case, and see whether it is reasonable and just that he should be allowed, having got judgment, to issue execution. The Act of Parliament has said in one section, in so many words, that he shall not; in another section it is enacted that, under certain circumstances, the Court shall have a discretion. That discretion is certainly one which ought to be exercised with great care, having regard to the general rights of creditors, and the equal distribution of the assets among them. I apprehend that there must be special circumstances, such as existed in the case which I have already disposed of, to entitle a creditor to leave to issue execution, and to do something in contravention of the rights of the general body of creditors. It will not suffice to say, “I am a *bonâ fide* creditor. I was going on as quickly as I could, and got judgment before the winding-up order was made, and, therefore, that entitles me to the leave asked, notwithstanding the Act of Parliament, which in express words says, ‘after the commencement of

the winding-up ;” and also that the commencement of the winding-up is the time of the presentation of the petition. It is, however, said, that there are in this case special circumstances ; but they are in reality nothing more than are to be found in the affidavit of the solicitor’s clerk, who deposed to what took place at the meeting before the Master on the 17th of January last. [His Lordship read the evidence set forth above.]

Is that evidence, taking it to be uncontradicted, as Mr. *Cutler* contends, a special circumstance in the case, which entitles the creditor to be placed in a better position than he would be in without it? The solicitor’s clerk who attended the Master made that representation for the purpose of getting time, not having any special authority from the company to make any representation, but he made that statement, and said that he knew a great deal about the solvency of the company, and so forth ; does the making of that statement constitute a special circumstance? In my judgment it does not. I cannot hold that this statement, taking it to have been made, as one may reasonably presume it to have been, was the reason and motive for making the order. The Master seems to have hesitated, for he asked “why they did not pay the money into Court as they were so solvent.” That was the Master’s observation, and he could hardly, I think, have founded his order simply and solely on the belief and the view that the company were making those representations to him. And as regards the solvency of the company, it has been observed that though they might not have been solvent from a commercial point of view, yet they might have moneys and assets which might be realized, and be sufficient to pay every creditor ; and I am not sure they will not have. But as regards the presentation of the petition, I have no reason to know or believe that there was anything said to the Master which was known to be untrue, or which was not in accordance with the belief of the clerk himself. It has been contended that if a person makes representations he must be answerable for them whether they be true or not. No doubt in certain cases that is so, but I think it inapplicable to this case. It appears to me that this is a case in which the creditor is not entitled to the benefit of his judgment, but that he must come in with the other creditors. The applica-

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*Ex parte*  
RAILWAY  
STEEL AND  
PLANT  
COMPANY.

*In re*  
WILLIAMS.

Judgment.  

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V.-C. H.      tion on the part of the creditor fails, and he must pay the costs of it.

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*Ex parte*  
RAILWAY  
STEEL AND  
PLANT  
COMPANY.

*In re*  
WILLIAMS.

The order will be to set aside the judgment with costs, and the liquidators must be allowed their costs out of the estate.

Solicitors for *Taylor*: *Hurford & Taylor*.

Solicitor for *Williams*: *C. F. B. Birchall*.

Solicitors for Official Liquidators: *Phelps, Sidgwick, & Biddle*, agents for *Sale, Seddon, & Hilton, Manchester*.

V.-C. H.

ROBARTS *v.* BUÉE.

1878

[1873 R. 21.]

Feb. 28.

*Administration Suit—Costs—Change of Solicitor—Solicitor's Lien—Set-off.*

1864 D 303

In an administration suit a decree was made against a Defendant, and he was ordered to pay the costs. He changed his solicitor, and subsequently thereto a motion by the Plaintiffs for leave to issue an attachment for disobedience to the decree and order was refused with costs:—

*Held*, that the Plaintiffs had a right to set off.

Statement.

THE bill in this cause was filed on the 14th of February, 1873, for the administration of the estate of *Elizabeth Buée*, and there was a prayer that the Defendant *John Chappell* might be ordered to deliver up the possession of certain premises, and for an account of what had come to his hands, and that he or some of the Defendants might be ordered to pay the costs of the suit.

A decree was made on the 27th of July, 1874, and in the terms of the prayer, and the Defendant *John Chappell* and another Defendant were ordered to pay the costs, which, after taxation, amounted to the sum of £277 18s. 3d. By an order of the 18th of February, 1875, the Defendant *John Chappell* was directed to pay other costs, which, after taxation, amounted to the sum of £24 13s. 8d., making a total of £302 11s. 11d.

On the 17th of May, 1877, the Plaintiffs moved for leave to issue an attachment against the Defendant *John Chappell*, for not obeying the decree and for not paying the costs, but the motion was dismissed with costs to be paid by the Plaintiffs to the De-



fendant *John Chappell*, and those costs, after taxation, amounted to the sum of £32 1s. The solicitor for the Defendant *John Chappell*, on the 11th of February, 1878, gave notice to the solicitor for the Plaintiffs that he claimed to have a lien for the costs which had been directed to be paid by the order of the 17th of May, 1877. After the order which was made in February, 1875, and before the motion made in May, 1877, the Defendant *John Chappell* had changed his former for his present solicitor—Mr. *J. K. Bartrum*.

*Boome*, for the Plaintiffs, now moved that the costs which were in May, 1877, ordered to be paid by them might be directed to be set off against the sum of £302 11s. 11d., after which there would still be a balance due from the Defendant *John Chappell* of £270 10s. 11d. He submitted that the practice was clearly stated in *Daniell's* Chan. Practice (1); and referred to *Cattell v. Simons* (2) and *Bryon v. Saloon Omnibus Company* (3).

*Bristowe*, Q.C., and *Chisholm-Batten*, for the Defendant, contended that in this case there was no right of set-off. The solicitor's claim to a lien was paramount, and the Defendant, to whom the costs of the motion of May, 1877, were ordered to be paid, was a mere trustee for his solicitor.

They referred to *Ex parte Cleland* (4), and *Mercer v. Graves* (5); and also to the statute 23 & 24 Vict. c. 127, s. 28, and asked that the motion should be dismissed with costs.

*Boome*, in reply, referred to *Throckmorton v. Crowley* (6).

HALL, V.C.:—

I am of opinion that the set-off asked for by this motion must be allowed. The distinction taken in the cases seems to me to be this,—that in regard to all costs arising in the same suit or action the right of set-off is sanctioned, and it is impossible to contend successfully that the practice ought to be different, and the costs ought to be dealt with separately, because two or three solicitors

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(1) 5th Ed. p. 1269.

(2) 6 Beav. 304.

(3) 4 Drew. 546.

(4) Law Rep. 2 Ch. 808.

(5) Ibid. 7 Q. B. 499, 508.

(6) Ibid. 3 Eq. 196.

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may have been employed by one or more Defendants. This was the view taken by the Master of the Rolls in *Cattell v. Simons* (1). The Master of the Rolls decided the other way in the case of *Collett v. Preston* (2), because in that case there were different proceedings—an action at law on a covenant, and a suit in equity—and held that there could not be a set-off. That is in accordance with sound sense, and the distinction there taken was recognised by Vice-Chancellor *Wood* in the case of *Throckmorton v. Crowley* (3), where set-off was allowed in regard to costs arising in the same suit, but not allowed where the costs had arisen in matters which were different. The decision in *Mercer v. Graves* (4) must be considered as in some respects interfering with but not as altering the ordinary rule. There the Court distinguished the case of *Ex parte Cleland* (5), and commented upon the equitable rule.

The principle is that where a solicitor is employed in a suit or action, he must be considered as having adopted the proceedings from the beginning to the end, and acted for better or worse. His client may obtain costs in some matters in the suit or action, and not in others, and the solicitor takes his chance, and may ultimately enforce his lien for any balance which may appear to be in favour of his client. Therefore, there being a strong authority in the Plaintiffs' favour, and no distinct authority against them, I shall adopt the rule laid down, and order that one bill of costs be set off against the other, and I will add, that the order might have been obtained in Chambers.

Solicitors: *W. P. Moore ; Wedlake & Letts*, agents for *J. K. Bartrum, Bath*.

(1) 6 Beav. 304.

(2) 15 Beav. 458.

(3) Law Rep. 3 Eq. 196.

(4) Ibid. 7 Q. B. 499, 508.

(5) Law Rep. 2 Ch. 808.

## KEENE v. BISCOE.

[1877 K. 17.]

FRY, J.

1878

March 2.

*Mortgage—Punctual Payment—Calling in—Acceptance of Interest—Waiver.*

A mortgagee agreed with the mortgagor that if the interest was duly and punctually paid the principal should remain for two years. Six months' interest became due and was demanded but was not paid; and the mortgagee then demanded payment of principal and interest. Three days afterwards the mortgagor paid the six months' interest, which was received by the mortgagee:—

*Held*, that the mortgagee had not thereby, nor by a subsequent unaccepted offer to receive an instalment, waived his right to call in the principal.

*Langridge v. Payne* (1) observed upon.

BEFORE the month of October, 1875, *James Keene*, the Plaintiff, agreed to lend to *Thomas Biscoe*, the Defendant, the sum of £400, on the security of certain leaseholds called the *Horseshoe Inn*, in *Goswell Street*. On the 15th of May, 1876, by a deed then dated, *Biscoe* covenanted with *Keene* to pay on demand £400, and interest at 5 per cent. per annum from that day to the day of repayment; and it was provided that if *Biscoe* should duly and punctually pay interest for the said sum of £400 at the rate aforesaid, by half-yearly payments, then *Keene* would allow the said sum of £400 to remain for two years; and *Biscoe* covenanted for payment at the end of the two years of £200, part of the £400, and interest thereon, and the residue of the sum of £400 on demand; and *Biscoe* charged the leaseholds with the said sum of £400 and interest, and covenanted to execute at any time, at the request of *Keene*, a legal mortgage of the leaseholds in favour of *Keene*, with such powers and provisoes as *Keene* might require. The £400 was advanced, and on the 16th of December, 1876, six months' interest became due. *Keene* had claimed that under a verbal agreement the money was to be paid off by annual instalments of £100, and his solicitors wrote, during the month of January, demanding payment of £100 and of the interest then due. Nothing was paid by *Biscoe*, and his solicitors wrote denying that the £100 instalment was due. On the 16th of January, 1877,

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*Keene* served *Biscoe* with a notice demanding immediate payment of the £400 and interest, and in default the execution of a legal mortgage. On the 19th of January, 1877, *Biscoe's* solicitors paid *Keene's* solicitors £10 for a half-year's interest, and *Keene's* solicitors wrote to *Biscoe's* as follows:—"Without prejudice to the notice we have given, we acknowledge receipt of your cheque for £10." *Keene's* solicitors wrote on the 6th of February, 1877, offering to accept an instalment of £100. No notice was taken of their letter, and this action was then brought by *Keene*, the mortgagee, claiming that *Biscoe* might be ordered to pay the £400, or in default to assign the leaseholds and be foreclosed.

*Biscoe*, by his statement of defence, denied that the £100 instalment was payable, and insisted that the payment of £10 interest was made generally, and must be taken to have relation to the day on which it became due; and that the receipt of interest condoned the default in payment, if any.

Argument.

*North*, Q.C., and *Speed*, for the Plaintiff:—

The Defendant, by not paying the interest punctually, has lost the benefit of the agreement not to call in the money, and the receipt of interest does not waive the rights of the Plaintiff: *Clough v. London and North Western Railway Company* (1); *Thompson v. Hudson* (2).

*Cookson*, Q.C., and *G. W. Lawrance*, for the Defendant:—

The Plaintiff has waived his right to call in the £400. He should have returned the cheque if he meant to retain his right. The receipt of interest cures the default: *Langridge v. Payne* (3); *Fisher on Mortgages* (4); *Davenport v. Reg.* (5); *Croft v. Lumley* (6). It is the Plaintiff's duty to shew that the time has arrived when he can exercise his right to call in the money.

Judgment.

FRY, J., after stating the facts, and expressing his opinion that the form of the receipt for the £10 paid was immaterial, because

(1) Law Rep. 7 Ex. 26, 34.

(2) Ibid. 4 H. L. 1.

(3) 2 J. & H. 423.

(4) 3rd Ed. vol. i. p. 348.

(5) 3 App. Cas. 115.

(6) 6 H. L. C. 672.



what was paid could not be affected by the terms of the receipt, *quicquid solvitur solvitur ad modum solventis*, continued:—

Then did the receipt of the £10 waive the Plaintiff's right to payment which had already accrued? I see nothing in it to have that effect. Where a right has accrued it can be waived, but to amount to waiver there must be something done which is inconsistent with the continuance of that right. Now, the right here was to immediate payment of £400 and interest, and the receipt of a portion of that sum is in no way inconsistent with that demand. I cannot conceive any case more different from that of receipt of rent after a forfeiture. In that case non-payment of rent has given rise to a right of forfeiture, but if the landlord afterwards receives any rent, that puts an end to his right of forfeiture; for if, after knowing the circumstances, he accepts rent, he in fact says that though he might have avoided the lease he has chosen not to do so; he has chosen to say that the lease shall subsist, and he cannot then say that it shall not subsist. The receipt of money as rent is inconsistent with the determination of the lease. But I see no inconsistency here.

It is said that this case is governed by the decision of *Langridge v. Payne* (1). And if this question was really there decided, I should certainly follow that decision; but that case is one which I cannot help regretting to find reported, because the judgment does not tell the reader upon what principle it proceeded, and it is merely a judgment restraining an ejectment until the hearing. The case was this: There was an agreement in writing that the mortgagee would not call in the money for two years, the mortgagor fulfilling the covenants. The mortgagor forgot to pay the interest, and the mortgagee gave him notice that in consequence of his failure to pay interest the mortgagee would not be bound as to the two years, but would exercise his discretion, and the letter requested payment of the interest due and the costs. The interest and costs were paid, and then the mortgagee issued a writ in ejectment. He was restrained until the hearing. Now the Vice-Chancellor might have thought that the notice was a conditional demand, and that the mortgagee in fact said, "If you make this payment I will for the present waive my right;" and

(1) 2 J. & H. 423.

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if that was so there was ground for the injunction. It is worthy of note that when that case was called to the attention of the Judge of the Landed Estates Court in *Ireland*, in *In re Taaffe's Estate* (1), he spoke in very strong terms, and said that the case would be overruled, and that he could not conjecture the ground of the doctrine on which it was decided. In other words, he thought it a mere determination on the balance of convenience till the hearing, and not on any doctrine. There is no principle in *Langridge v. Payne* (2) inconsistent with my decision.

It was then suggested that by what took place subsequently, the Plaintiff waived his right; and reliance was placed on the letter of the 6th of February, 1877. That letter refers to a suggestion that there was a verbal agreement as to the instalments. But the letter meant simply, "I have a right, but if you, the Defendant, comply with my demand, I shall not enforce that right," just as in *Langridge v. Payne*, where the Vice-Chancellor may have thought that a condition had been made and complied with. But here it was not complied with, and the offer, if ever made, fell to the ground. There is nothing in that letter inconsistent with the claim of the Plaintiff now to enforce his right.

It appears to me that this action is perfectly well grounded; and I must give judgment for payment of the £400 and interest, and if the money is not paid, then for conveyance of the legal estate; and the Defendant must pay the costs of the action.

Solicitors for Plaintiff: *Layton, Son & Lendon.*

Solicitor for Defendant: *A. E. Briant.*

(1) 14 Ir. Ch. Rep. 347.

(2) 2 J. & H. 423.

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[1877 J. 110.]

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March 18, 19.

*Mortgage—Power of Sale—Trust of surplus Sale Moneys—Inconsistency between Reservation of Equity of Redemption and Trust of surplus Sale Moneys—Resulting Trust—Conversion—Real and Personal Representatives.*

By a marriage settlement land of the husband was conveyed, "for making a provision" for the wife and the issue of the intended marriage, to such uses as the husband and wife should during their joint lives by deed appoint, remainder to the use of the husband for life, remainder to the use of the wife for life, remainder to the use of the children of the marriage as the husband and wife should by deed jointly appoint, or as the survivor should by deed or will appoint, and, in default of appointment, to the use of the children in equal shares as tenants in common in fee, and, if but one child, to the use of that one child in fee, with an ultimate remainder in default of children to the use of the heirs and assigns of the husband. There was a proviso that the grantees to uses and the survivor of them, and the executors and administrators of the survivor, their or his assigns, should, after the death of the survivor of the husband and wife, and during the respective minorities of any of their children, receive the rents of the share of such child or children, and should, after providing for his, her, or their maintenance and education, invest the surplus (if any) as therein mentioned, and accumulate the same in trust for the persons who should ultimately become absolutely entitled to the shares from which the same should have proceeded. No money fund (other than these accumulations) was included in the settlement, and it contained no power of sale. Some years after the solemnization of the marriage the husband and wife mortgaged the property. The mortgage deed contained a recital of the settlement, and a recital that the husband and wife had requested the mortgagee to lend them £600 on the security of the property, which he had agreed to do, but it contained no other recital, and by it the husband and wife, in exercise of their joint power, appointed the property to the use of the mortgagee in fee, but subject to a proviso for redemption on payment of the mortgage money. The proviso was for reconveyance of the property to the uses of the settlement. The mortgage contained a power for the mortgagee to sell the property, and a declaration that, in case the property or any part of it should be sold under the power, the mortgagee should, after paying the expenses of sale and the principal and interest due upon the mortgage, pay over the surplus (if any) to the husband, his heirs, executors, administrators, or assigns. After the death of the husband the mortgagee sold the whole of the property, and, after payment

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of expenses and the mortgage debt and interest, there remained a surplus in his hands:—

*Held*, that there was no resulting trust of the surplus, but that the husband's personal representative was entitled to it as part of his personal estate.

THIS action was brought by a mortgagee, who had in his hands surplus moneys resulting from the sale of the mortgaged property under a power of sale, to determine who was entitled to those moneys.

On the 29th of October, 1855, a settlement was executed in contemplation of a marriage then intended between *John Davies* and *Gladice Davies*. This deed contained recitals of the agreement for the marriage; that *John Davies* was seised in fee of the hereditaments thereafter described; and that upon the treaty for the intended marriage it was agreed that the property should be assured by *John Davies* to *David Davies* and *Thomas Williams* to the uses, upon the trusts, and for the ends, intents, and purposes thereafter expressed concerning the same. And it was witnessed that, in pursuance of the agreement, and in consideration of the intended marriage, “and for making a provision for the said *Gladice Davies* in case the said marriage shall take effect, and for the issue (if any) of the said intended marriage,” *John Davies* granted to *David Davies* and *Thomas Williams* and their heirs the hereditaments therein described, to have and to hold the same unto *David Davies* and *Thomas Williams*, their heirs and assigns, for ever, “to the uses, upon the trusts, and for the several ends, intents, and purposes, and under and subject to the several powers, provisoes, limitations, declarations, and agreements hereinafter declared or expressed of and concerning the same (that is to say), to the use of the said *John Davies* and his heirs until the solemnization of the said intended marriage, and, from and after the solemnization thereof, to such uses, upon such trusts, and for such intents and purposes, and under and subject to such powers, provisoes, declarations, and agreements, and charged and chargeable in such manner and form as the said *John Davies* and *Gladice Davies*, his said intended wife, shall at any time or times, or from time to time during their joint lives, by any deed or deeds, jointly direct, limit, or appoint.” And in default of appointment the property was limited to



the use of *John Davies* and his assigns during his life, with remainder to the use of *Gladice Davies* and her assigns during her life, with remainder to the use of all and every the child or children of the marriage, or such one or more exclusively of the others of them as *John Davies* and his wife should by deed jointly appoint, or as the survivor of them should by deed or will appoint, and, in default of appointment, to the use of all and every the child and children of the marriage in equal shares, if more than one, as tenants in common in fee, and, if there should be but one such child, to the use of that child in fee, with remainder, in the event of the death of any of the children under twenty-one without leaving issue living at the time of their deaths respectively, to the use of the other children in equal shares as tenants in common in fee, with remainder, in case every child of the marriage should die under twenty-one without leaving issue living at their deaths respectively, to the use of the heirs and assigns of *John Davies*. There was a proviso that *David Davies* and *Thomas Williams* and the survivor of them, and the executors or administrators of such survivors, or their or his assigns, should, after the death of the survivor of *John Davies* and *Gladice Davies*, and during the respective minorities of any of their children, receive the rents of the share of such child or children in the settled hereditaments, and apply the whole, or a competent part thereof, in or towards his, her, or their maintenance and education, and invest the surplus (if any) in the names or name of the trustees or trustee for the time being in the securities therein mentioned, and accumulate the same, and that the accumulations should belong to and be in trust for the person or persons who should ultimately become absolutely entitled to the share from which the same should have proceeded. There was a power of appointing new trustees, and other ordinary trustee clauses, but not a receipt clause. The deed contained no power of sale, and no settlement of any money fund, other than the accumulations of rents during the minorities of the children. The marriage took place soon after the execution of the settlement.

By an indenture of mortgage dated the 24th of June, 1862, after a recital of the settlement, and a recital that *John Davies* and his wife had requested *W. J. Evans* to advance them £600 at

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interest on the security of the property comprised in the settlement, which *Evans* had agreed to do, it was witnessed that, in pursuance of the agreement, and in consideration of £600 paid by *Evans* to them, *John Davies* and his wife, in pursuance of and in exercise and execution of the power reserved to them by the settlement, appointed the property to the use of *Evans* in fee, but subject, nevertheless, to the proviso for redemption, and to the powers, provisoes, declarations, and agreements thereafter expressed and contained. And it was further witnessed that *John Davies* and his wife granted, released, and confirmed the property unto *Evans*, his heirs and assigns, to have and to hold the same unto and to the use of *Evans*, his heirs and assigns, for ever, subject to the proviso for redemption thereafter contained. And it was provided that, if *Davies* and his wife, their heirs, executors, or administrators, or any or either of them, should, on the 24th of June, 1863, pay to *Evans*, his executors, administrators, or assigns, the £600, with interest as therein mentioned, then *Evans*, his heirs or assigns, would, at the request and costs of *John Davies* and his wife, their heirs or assigns, or some or one of them, re-convey the property "to such and the same uses, upon such and the same trusts, intents, and purposes, and subject to such and the same powers, provisoes, declarations, and agreements, as were limited and expressed of and concerning the same in and by the said recited indenture of settlement, or as near thereto as the deaths of parties and other circumstances will then permit," free from incumbrances occasioned by *Evans*, his heirs or assigns. There was also a power to sell the property, if default should be made in payment of the £600 or the interest, exerciseable by *Evans*, his heirs, executors, administrators, or assigns. There was a proviso that the power of sale should not be exercised without giving six months' notice to *John Davies* and his wife, their heirs, executors, administrators and assigns, or some or one of them. And it was declared that, in case the property or any part of it should be sold under the power of sale, *Evans*, his heirs, executors, administrators or assigns, should, out of the purchase-moneys, pay the expenses of the sale or sales, and, in the next place retain the £600 and interest, or so much thereof as should then remain due, "and shall pay over the surplus (if any) to the said *John Davies*, his heirs,

executors, administrators, or assigns." There was a covenant by *John Davies* for himself, his heirs, executors, and administrators, and for his wife, that he and his wife, their heirs, executors, administrators, or assigns, or some or one of them, would pay the mortgage money and interest at the time appointed, and a similar covenant for title. On the 24th of January, 1872, *Evans* transferred the mortgage to *D. W. Jones*, the Plaintiff in this action. In 1869 *John Davies* died intestate, and administration of his personal estate was granted to his widow. She afterwards married *Martin Butler*.

There were seven children of *John Davies* and his wife. In October, 1875, the Plaintiff, in exercise of the power of sale, sold the whole of the mortgaged property, and, after payment of the principal, interest, and costs, there remained in his hands a balance of £2488 14s. 4d. This sum was claimed by Mrs. *Butler* as part of the personal estate of *John Davies*; by his eldest son as his heir-at-law; and by the surviving trustee of the settlement, and the other six children, as subject to the settlement. The action was brought to ascertain the rights of the parties.

This was the trial.

*H. A. Giffard*, for the Plaintiff, stated the case.

*Hadley*, for the children, other than the heir-at-law:—

I cannot dispute that the power given to the husband and wife by the settlement is a general one, for, though it enables them to defeat the settlement altogether, its language is unambiguous: *Peover v. Hassel* (1). Still the origin and object of the power must be regarded; the intention of it obviously was to enable the husband and wife to borrow money if the exigencies of their family should require it. There is nothing in the mortgage deed to shew an intention of doing anything more than borrow money, and it cannot be supposed that the parties intended to defeat the settlement, except for the purpose of raising the money. It would be absurd to suppose that the devolution of the property was intended to depend upon the will of a mere stranger, upon the accident whether the mortgagee should or should not exercise

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(1) 1 J. & H. 341.

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his power of sale. The right inference is, that a mistake has been made in the direction as to the payment of the surplus sale money, and that there is a resulting trust upon trusts corresponding to the uses of the settlement. There is no authority directly in point, but there are numerous cases in which, where a wife's real estate or real estate in settlement has been mortgaged to secure a loan to the husband, and the equity of redemption has been reserved in terms such as to change the devolution of the property, the Court has held that a mortgage only was intended, and has implied a resulting trust in favour of the persons originally entitled, unless there was a clear manifestation of a contrary intention: *Jackson v. Innes* (1); *Broad v. Broad* (2).

[FRY, J., referred to *Plowden v. Hyde* (3).]

*Huntington v. Huntington* (4); *Rowel v. Walley* (5); *Ruscombe v. Hare* (6); *Jackson v. Parker* (7).

[FRY, J., referred to *Martin v. Mitchell* (8), as stating very clearly the effect of the decision in *Jackson v. Innes*.]

*Whitbread v. Smith* (9); *Lord Hastings v. Astley* (10); *In re Betton's Trust Estates* (11); *Sugden on Powers* (12). The presumption is, that a mortgage is executed solely for the purpose of raising money, and the mortgagor does not contemplate the mortgagee selling more than so much of the property as will satisfy his debt.

*North, Q.C.*, and *E. Wilkinson*, for the husband's administratrix:—

The settlement is a strictly legal one of land; there is no settlement of money, except in the case of an accumulation of surplus rents during the minority of the children. The words of the trust of the surplus sale moneys in the mortgage are clear and unambiguous, and the marked distinction between them and the words of the reservation of the equity of redemption points to an intention that, if the property was turned into money, it should

(1) 1 Bli. 104.

(2) 2 Chan. Cas. 93, 161.

(3) 2 D. M. & G. 684.

(4) 2 Vern. 437.

(5) 1 Rep. in Ch. 116.

(6) 6 Dow, 1.

(7) Amb. 687.

(8) 2 Jac. & W. 413.

(9) 3 D. M. & G. 727.

(10) 30 Beav. 260.

(11) Law Rep. 12 Eq. 553.

(12) 8th Ed. pp. 274-285.



devolve differently than it would do if it remained as land. There would be nothing absurd in such an intention. If a resulting trust is to be implied there is nothing to shew what its nature is to be. What would be the power of the trustees? *Lord Cranworth's Act*, 23 & 24 Vict. c. 145, s. 34, does not apply, because the trust is not declared by a written instrument. The power of appointment in the settlement is an absolute one, and the inference is that the husband and wife intended to defeat the settlement in case the land should be turned into money. The case is not like those cited; the difficulty does not arise upon a comparison of the reservation of the equity of redemption with the original limitation of the property, but it arises entirely on the construction of the mortgage deed itself, and there is no difficulty in construing that. Some of the observations of Vice-Chancellor *Wickens* in *In re Betton's Trust Estates* (1) are in our favour, and so are those of Lord *Redesdale* in *Jackson v. Innes* (2). *Scholefield v. Lockwood* (3) is an authority in our favour, and so are *Reeve v. Hicks* (4), *Heather v. O'Neil* (5), *Atkinson v. Smith* (6), *Anson v. Lee* (7). The direction to pay the surplus sale moneys to the husband is analogous to an express trust in his favour, and in *Heather v. O'Neil* Lord Justice *Turner* said that where an express trust is declared, that is inconsistent with the notion of there being any resulting trust.

[They referred also to *In re Vizard's Trusts* (8); *Dawson v. Bank of Whitehaven* (9).]

*Tyssen*, for the heir-at-law, adopted the same argument.

*Hadley*, in reply:—

The mortgage deed recites only the agreement for a loan; it recites no intention to change the devolution of the property. In *Scholefield v. Lockwood* the wife only claimed to be indemnified against the mortgage debt. The decision in *Heather v. O'Neil* depended on very special facts; it is really an authority in my

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(1) Law Rep. 12 Eq. 553.

(2) 1 Bli. 114, 126.

(3) 4 D. J. & S. 22.

(4) 2 S. & S. 403.

(5) 2 De G. & J. 399.

(6) 3 De G. & J. 186.

(7) 4 Sim. 364.

(8) Law Rep. 1 Ch. 588.

(9) 6 Ch. D. 218.

FRY, J. favour. *Anson v. Lee* (1) is disapproved by Lord *St. Leonards*,  
 1878 *Sugden* on Powers (2). *In re Vizard's Trusts* (3) does not apply.  
 JONES The direction as to the payment of the surplus sale moneys arose  
 v. from the fact that the settlement did not designate any one to  
 DAVIES, whom they were to be paid.

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FRY, J., after stating the effect of the settlement, continued:—

Now, that settlement was one of a strictly legal character. The trustees took no legal estate. They were mere grantees to uses, and the interests of the persons claiming under the settlement were legal interests. There was no power of sale in the settlement, and there was no settlement of any money. It was a strict settlement of land, creating uses and nothing more, with the single exception of the right of entry given to the trustees in the event of the minority of the children after the death of the parents.

It is to be observed also that the settlement, although it is stated to be executed for the purpose of making a provision for the wife and the issue of the marriage, nevertheless put the estate absolutely and entirely in the power of the husband and wife during their joint lives, and enabled them, if they were so minded, to defeat either wholly or partially the provisions made for themselves or for their children.

[His Lordship then stated the provisions of the mortgage, and continued:—]

The question is whether the direction to pay the surplus of the sale moneys, in the event of the power of sale being exercised, to *John Davies*, his heirs, executors, administrators, or assigns, means simply what it says, or whether, from the circumstances of the case, a resulting trust is to be held to have arisen. That is the sole question for my decision.

I must observe, in the first place, that, as a general rule, deeds ought to be held to operate according to their express language. The express language of this deed is that the money in question shall be paid to *John Davies*. So far as the language of the deed goes, that is quite clear; and it is not a case in which there can

(1) 4 Sim. 364.

(2) 8th Ed. p. 278.

(3) Law Rep. 1 Ch. 588.

be any suggestion of fraud. It cannot be said that the direction to pay the surplus money to *Davies* is a fraud on any one claiming under the settlement, for *Davies* and his wife had the absolute control of the settled property,—they might do whatever they liked with it. Can I say that this clause, on which everything turns, has been introduced by reason of some inaccuracy? Can it be said that the provision which ought to have been inserted in the deed in place of the direction to pay to *John Davies* is one which the circumstances so clearly shew to be proper that I can infer that a mistake has been made when I do not find that provision there? It appears to me that I cannot draw any such inference. It is quite true that in some cases more or less like this the Court has inferred a mistake; but the extent to which that inference has gone is, I think, clearly expressed in the judgment of Lord Justice *Turner* in *Heather v. O'Neil* (1). He says that “in cases depending merely upon the reservation of the equity of redemption, variations which can reasonably be referred to mistake or inaccuracy are not to be regarded, but, if the variations be such that they cannot from their nature be referred to mistake or inaccuracy, I think they must have their effect.” Now this is not a case depending, as the Lord Justice expressed it, merely on the reservation of the equity of redemption, because the equity of redemption is distinctly reserved to the uses of the settlement, and the question really turns on the difference between that reservation and the direction as to the surplus sale moneys. I do not think it would be safe or right to extend the inference of mistake or inaccuracy to cases in which it does not clearly arise in the mind of the Court, or to which the principles explained by Lord Justice *Turner* do not extend. I cannot hold, therefore, that there has been any mistake or inaccuracy in this case. But it is said that it would be manifestly absurd to hold that the deed is to operate according to its language. Let us see what the result will be of giving effect to it simply as it stands. It is this, that, in the event of the mortgaged property being redeemed and remaining *in specie* as land, the settlement will still exist, and the successive interests of husband, wife, and children will remain in force. But, if the mortgage is not redeemed, and if the mortgagee

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(1) 2 De G. &amp; J. 416.

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exercises his power of sale, and thereby turns the land into money, then the husband is to receive it. Such an arrangement, it seems to me, is not an unreasonable one, and the husband and wife might very well be supposed not to object to it. They might say: "So long as the land remains land we desire that the settlement shall subsist, but, if the land is turned into money, we do not intend to cast upon our trustees the burden of a new settlement. In our settlement no provision exists with regard to a money fund, and we have no intention of creating a new money settlement."

Then, again, I inquire, is there any ambiguity in the terms of the deed as it stands? I am at a loss to find any. If the parties to the deed, the husband and wife, intended to do what they have said, and nothing more, they seem to me to have expressed themselves with ample clearness. It is quite true that there is no recital of an intention that the surplus sale moneys shall be paid to the husband, and it is said that in the absence of such a recital I am bound to infer that the money was intended to go upon trusts corresponding with the legal uses of the settlement. It seems to me that that is a very strong contention. The difference between a settlement of land and a settlement of money is one which every one conversant with the law knows. The trustees of the settlement had not undertaken to be trustees of any money fund, no trust had been declared of any money. No powers of investment were inserted in the settlement which were applicable to such a fund; and it appears to me that, if the parties had been minded to create that which did not exist before, a money settlement, we should have found that intention expressed in clear and unambiguous language, and provisions inserted in the deed to give effect to that intention.

Further, it is said that I am bound by the circumstances of the case to come to the conclusion that there was a resulting trust of this money. What are the circumstances under which that inference could with propriety be drawn? There have been many cases in which the Court has had to put an interpretation upon the uses referred to in a proviso for redemption, where that, and that almost alone, has been the question for decision. The principle of these cases is well expressed in *Jackson v. Innes* (1),

(1) 1 Bli. 126.



where Lord *Redesdale* used this language: "It must now be admitted as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife, or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of any ambiguity, that there is a resulting trust for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case."

I am not convinced that Lord *Redesdale's* language or his meaning extends to the kind of case which is before me, where the settlement was made subject to an absolute power of appointment in the husband and wife, giving them entire control over the property and enabling them to do what they liked with it. Moreover, the cases to which he referred were those in which there is a mere reservation in the proviso for redemption, or an ambiguity in the words of the proviso for redemption. In the present case I have not to do with a mere reservation in the proviso for redemption, or with an ambiguity in the words of the proviso for redemption. The proviso for redemption is clearly to the uses of the settlement, but a different trust is declared with regard to the surplus sale moneys. There is no ambiguity, according to my construction of the deed, and it is not therefore a case which comes within the principle laid down in *Jackson v. Innes* (1). Furthermore, it appears to me that there would be some difficulty in saying what the resulting trust in this case should be; would it require the husband to pay the moneys over to the trustees of the settlement, or would it require him to hold them for the benefit of himself, his wife, and his children? Upon what securities ought the trust fund to be invested? What power of changing the investments would there be? All these questions might be asked, and, in my opinion, they could not be easily answered. Moreover, it must be observed that the resulting trust would include the general power of appointment, and the husband and wife would

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be entitled by an exercise of that power to appoint the fund absolutely as they pleased.

In one word, it appears to me that a resulting trust is to be implied only where it appears that the taker is not intended to take beneficially. In this case there does not appear to me to be such an intention, and therefore I hold that there is no resulting trust.

Consequently, as against Mr. *Hadley's* clients, I hold that the money is to go to *John Davies*, his heirs, executors, administrators, or assigns. The question now arises whether it goes to the heir or to the administratrix.

Argument.

*North, Q.C.*, and *E. Wilkinson*, for the administratrix :—

The land has been converted into money, and it must devolve upon the person who is entitled to it in its actual condition. But for this declaration, the husband would have had no interest at all. *Wright v. Rose* (1) and *Bourne v. Bourne* (2) do not apply.

*Tyssen*, for the heir-at-law :—

The intention was that, if the power of sale was exercised during the husband's life, the money should become his personal estate ; but that if, as has happened, the sale should take place after his death, the money should belong to his heir. The cases cited apply, and are authorities in my favour.

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FRY, J. :—

As between the heir and the administratrix, it seems to me that the money must go to the administratrix. It is in the nature of personal property. The trust to pay does not arise until after the conversion of the estate, and the personal representative is entitled to it. It must be borne in mind also that the husband, to whom the money is directed to be paid, had at the time no interest in the equity of redemption, except in respect of the ultimate remainder to him in the event of failure of issue, which event has not arisen. It appears to me that I am really dealing with this money as affected by a simple direction, given by persons who had

(1) 2 S. & S. 323.

(2) 2 Hare, 35.

the absolute control over the estate, that it should be paid to a particular person. FRY, J.

I must therefore make a declaration that the legal personal representative of *John Davies* is entitled to the fund.

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—

The costs of all parties will be paid out of the fund.

Solicitors for Plaintiff: *Bower & Cotton*, agents for *T. H. Stephens, Cardiff*.

Solicitors for Defendants: *Norris, Allens, & Carter*, agents for *W. J. Evans, Llandovery*.

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Jan. 21, 28.

*Charge by a Partner on his Share in Partnership—Chose in Action—Bankruptcy Act, 1869, s. 15, sub-s. 5—Bills of Sale Act, 1854, s. 7—Joint Ownership—Partners.*

*B.*, as trustee and executor of his father's will, became entitled to one half share in a distillery business lately carried on in partnership between his father and another. In pursuance of a provision in the will, *B.* continued the partnership business, and afterwards purchased the interest of the beneficiaries under the will, and executed mortgages to secure the purchase-money, by one of which, dated September 1872, *B.* assigned all his beneficial interest under his father's will as a security for payment of the money due, and by the same deed charged all his share and interest in the distillery partnership, and in the good-will of the business, with the repayment of the money due. New articles of partnership were then entered into between *B.* and the old partner, in which the former appeared as the owner of one half the business.

In June, 1877, *B.* was adjudicated bankrupt, and his share in the partnership had since been sold to the other partner :—

*Held*, as between *B.*'s trustee in bankruptcy and the mortgagee, that the mortgage of *B.*'s share and interest in the partnership was a charge upon a *chose in action*, and as such, was not affected by the *Bankruptcy Act*, 1869, s. 15, or by the *Bills of Sale Act*, 1854 :

*Held*, also, that to bring partnership goods within the order and disposition clause, they must have been in the sole and absolute possession of the bankrupt; and that, as the mortgagee of *B.*'s share had not acquired the right to take possession of any of the partnership property, *B.* was not in possession with the consent of the true owner.

*Ex parte Dorman* (1) followed.

*Ryall v. Rowles* (2) considered.

Statement.

THIS was an appeal from an order of the *Surrey County Court* Judge dismissing a motion of *Robert Fletcher*, the trustee in bankruptcy of *T. Y. C. Bainbridge*.

*Thomas Drake Bainbridge* (the father of the bankrupt) was a partner in the distillery in *Holborn* known as "*Anderson & Company*," his co-partners being the bankrupt, to the extent of one-sixteenth, and *Sir Allan Young*. On the 8th of February, 1870, *T. D. Bainbridge* (the father) died, having by his will and codicil devised and bequeathed all his real and personal estate to two trustees, of whom *T. Y. C. Bainbridge* was one, upon trust to sell,

(1) *Law Rep.* 8 Ch. 51.

(2) 1 Ves. Sen. 375.



convert, and divide the same equally among his four sons, *T. Y. C. Bainbridge*, *R. Bainbridge*, *E. Bainbridge*, and *E. R. Bainbridge*. Considerable discretionary powers as to conversion, winding-up the partnership, and generally, were given by the will to the trustees. *T. Y. C. Bainbridge* eventually became the sole trustee of the will, and continued the business for some time in partnership with Sir *Allan Young*. In 1872 arrangements were made for the purchase by *T. Y. C. Bainbridge* of the interests of his brothers under the will in the distillery, and mortgages were executed to secure the purchase-money. One of these mortgages, the validity of which was the subject of these present proceedings, was dated the 4th of September, 1872, and was between *T. Y. C. Bainbridge* of the one part, and *E. R. Bainbridge* of the other part. By this deed *T. Y. C. Bainbridge* purported to "assign (but not so as to pass his estate as trustee under the will, but only his beneficial interest thereunder) unto the said *E. Rate Bainbridge*, his executors, administrators, and assigns, all the share, estate, and interest of him the said *T. Y. C. Bainbridge* in and under the said recited will of the said *T. D. Bainbridge*, deceased, and of and in the moneys and estate thereby devised and bequeathed as aforesaid," as a security for payment of the money due, and by the same deed "charged and made liable all the share and interest of him the said *T. Y. C. Bainbridge* of and in the said distillery, and of and in the said partnership, and of and in the good-will of the said business," with the repayment of the money due to his brother.

*T. Y. C. Bainbridge* continued a partner in the distillery with Sir *Allan Young*, new articles of partnership, dated the 1st of April, 1873, having been entered into between them, in which *T. Y. C. Bainbridge* appeared as the owner of one-half the business.

On the 11th of June, 1877, *T. Y. C. Bainbridge* was adjudicated a bankrupt; his share in the partnership had since been sold to Sir *Allan Young* for over £40,000.

The mortgage of the 4th of September, 1872, was admitted by the bankrupt's trustee to be a valid charge to the extent of over £26,000, being the value of an undivided moiety of the distillery and premises, and of the fixtures thereon not being tenant's or trade fixtures; but the trustee, as against *E. R. Bainbridge*, the mortgagee, claimed to be entitled to the proceeds of sale of the

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C. J. B. bankrupt's interest, amounting to over £14,000, in "the tenant's
 1878 and trade fixtures in or upon the said distillery and premises, and
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 In re in the plant, stock-in-trade, assets, property, good-will, and book  
 BAINBRIDGE, debts of the late firm of *Anderson & Co.*," on the ground that the  
 Ex parte stock-in-trade and debts were within the provisions of the *Bank-*  
 FLETCHER, ruptcy Act, 1869, s. 15; and also claimed the fixtures under the  
 ——— Statement. *Bills of Sale Act*, 1854, as the mortgage had never been registered  
 ——— in pursuance of that Act. The County Court Judge having dis-  
 allowed this claim, the trustee now appealed.

Argument.  
 ———

*Winslow*, Q.C., and *Northmore Lawrence*, for the Appellant:—

If a mortgagee of one partner's share allows the mortgagor to retain possession of the mortgaged property and to act as an ostensible partner, his security will not, as to chattels which are within the doctrine of reputed ownership, on the bankruptcy of the mortgagor, prevail against his trustee: *Ryall v. Rowles* (1); *Robson* on Bankruptcy (2); and even the lien of the other partners upon such goods and chattels will be overridden in favour of the creditors of those in whose order and disposition the goods and chattels were at the time of the bankruptcy: *Lindley* on Partnership (3). The stock-in-trade and the debts having been left in the order and disposition of the bankrupt, we are also entitled, under the 5th sub-section of sect. 15 of the *Bankruptcy Act*, 1869. [They also referred to the mode of execution against a partner by the sheriff, and observations thereon in *Lindley* on Partnership (4).] As to the fixtures, we claim them under the *Bills of Sale Act*, 1854, as the mortgage is not registered.

*De Gex*, Q.C., *Charles Browne*, and *Finlay Knight*, for the Respondent:—

The mortgage of the 4th of September, 1872, was a mortgage of a *chose in action*; it was a mortgage of the bankrupt's "share and interest in the partnership," which was lawfully assigned to us before any act of bankruptcy was committed. The "share" of a partner is simply his proportion of the partnership assets after they have all been realized and converted into money, and all the

(1) 1 Ves. Sen. 375.

(3) 3rd Ed. p. 1194.

(2) Page 640.

(4) Ibid. 707-709.

debts and liabilities have been paid and discharged: *Lindley* (1). *Ryall v. Rowles* (2) is no longer applicable; though certainly a leading case to the effect that *choses in action* are goods and chattels, it is not now the law on any other point. What the mortgagee has under this deed is a charge on a share in the partnership, which gives him a right to institute proceedings to have accounts taken; this right is a *chose in action*, this mortgage is distinctly a mortgage of a *chose in action*.

To bring goods within the order and disposition of a bankrupt under the *Bankruptcy Act*, 1869, s. 15, they must be in his sole possession and sole reputed ownership: *Ex parte Dorman* (3); the goods were in the bankrupt's possession only as one of the partners, and the law is the same even where one partner is allowed to carry on the business ostensibly as his own: *Reynolds v. Bowley* (4). If this mortgage is a mortgage of a *chose in action*, as we say it is, it is not within the operation of the *Bills of Sale Act*, for it is not a mortgage of anything that is "capable of complete transfer by delivery" according to sect. 7.

[They also cited *Lindley* (5); *Ex parte Kemp* (6); *Taylor v. Fields* (7); *Skipp v. Harwood* (8); *West v. Skip* (9); *In re Wait* (10).]

*Winslow*, in reply.

BACON, C.J.:—

The case of *Ryall v. Rowles* has been referred to at very great length, and it has been said that that case has never been disputed; and, no doubt, there is a great deal to be found in that case that never was disputed when that case was decided. There the Court ultimately decided that the interests were *choses in action*, except all the fixtures, and that they passed under the order and disposition clause. But the law has been wholly altered since then. No *choses in action* now pass under the order and disposition

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(1) 3rd Ed. p. 681.

(2) 1 Ves. Sen. 375.

(3) Law Rep. 8 Ch. 51.

(4) Ibid. 2 Q. B. 474.

(5) 3rd Ed. pp. 708, 710, 718.

(6) Law Rep. 9 Ch. 383.

(7) 4 Ves. 396.

(8) 2 Sw. 586.

(9) 1 Ves. Sen. 239.

(10) 1 Jac. & W. 605.

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clause except debts due in the course of trade or business. The alteration of the law was made not unadvisedly, because very hard cases had occurred. However, I need not more particularly refer to that. What I most have to deal with are the facts of this particular case, and they appear to me to be admitted by the parties to be these:—[His Lordship then stated the facts.]

Now the father's interest has not been questioned. After the charges upon the partnership were satisfied, what remained would be clear surplus. If his trustee chose to withdraw the capital from the business he would be entitled to receive his money; until then the interests of the persons entitled under the father's will were purely equitable.

There was no other way of dealing with their rights. The son, succeeding to the father's business, was, as to every part of the father's share, a trustee only, and he had no other right or interest in any part of it but in his character of trustee, and as trustee he must carry on his late father's business—and the testator meant that that should be so. The estate of the testator was, and always has been, an estate held in trust to carry on the business. Then the legatees, having thought it right to call for a division of this estate, bargain with the son to sell their interests, and the money not being forthcoming, he assigns to his brothers all the interest in his father's estate when it should be forthcoming, and he charges his own small interest in the partnership with the payment of the same debt. That, I think, is the state in which things happened to be when the act of bankruptcy was committed.

Now, the trustee here claims by relation to the act of bankruptcy, which is said to have been sometime in the month of October, 1876. The trustee says that, the property having been left in the order and disposition of this bankrupt under the *Bankruptcy Act*, s. 15, he is entitled to claim it. First of all, it was not, in point of fact, within the order and disposition of the bankrupt at all. He was trustee and trustee only of it, except his own small share. But the Act of Parliament is, in my judgment, perfectly clear, and even if I had not the assistance of *Ex parte Dorman* (1), and if I was not bound by that case, I should act upon it. It is as clear as anything can possibly be. [His



Lordship read sect. 15, sub-sect. 5, and continued:—] Can it be said that, these two gentlemen carrying on partnership together, any one part of this property remained in the order and disposition of the bankrupt with the consent of the true owner. Not only do I adopt the judicial interpretation in *Ex parte Dorman* (1), and say it relates to sole possession of that kind alone, but I say that it must be necessarily so, for it is impossible to point out anything in the case to shew that either of these partners was more a partner than the other. Partners are possessed *per mie et per tout*; and each of them was lawfully in possession of the whole of the assets, but not exclusively in possession, not solely in possession. It is said that a partner might do and could do almost anything without limit, provided it is within the law—that every partner may deal as he will with the partnership property, and in collecting the partnership assets. How does he deal with them? Everything he does is done on the presumption that he is lawfully constituted agent of his partner, that is, that they are both owners; neither is more the owner than the other; neither is sole owner. They are both entitled to do all lawful things until the conclusion of the partnership transactions; whichever of them does a thing, he does it for himself and the other, and does nothing, takes no action, except under the partnership. I am wholly at a loss to supply any words to sect. 15 such as the Appellant suggests to me. If the exclusion of *choses in action* was not sufficient, then, I say, there is no sole possession—no sole order and disposition—no holding out to the world, and no other circumstances of that kind. The thing is essentially a *chose in action* and nothing else. The interest he had as trustee was a legal interest as distinguished from the beneficial interest which he had under his father's will, and that which was acquired by the transaction with his brother was a *chose in action* and nothing else. There can be no doubt, at this time of day, thrown upon the law that a partner is entitled only to such share of the partnership property as may exist after all the debts of the partnership are paid and the property has been realized; and when it has been realized it cannot be said that the partnership debts are paid but by realization. That is what the Respondent in this case claims. He says, "I am the

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owner of a *chose in action* lawfully assigned to me before any act of bankruptcy was committed, and if any act of bankruptcy was committed, to whatever it relates, it cannot apply to this *chose in action*. This right which I have is to take proceedings to require my brother to ascertain this trust estate—to withdraw it from risk if it is proper and right that it should be withdrawn from risk—to take accounts of the estate of the testator whose trustee he is, so that I may know to what I am entitled under the will, and that it may be ascertained.” That is the simple state of the case.

With the greatest respect and veneration for the case of *Ryall v. Rowles* (1), I do not think that that case has the remotest application to this question before me, now that the law is altered respecting *choses in action*.

A sum of money is due from Sir *Allan Young*, which may be sued for if it is not voluntarily paid, but which Sir *Allan Young* will not pay until he has a title to the thing he has purchased, and in order to make a title it is necessary that the Respondent should join. The Respondent holds a mortgage upon the estate of his father and a charge upon the estate of his brother—such as it was—the share which he had in the partnership. That charge must be satisfied by payment to the man who is entitled.

I therefore desire it to be understood that, in my opinion, there is no doubt about the right of a partner, notwithstanding the cases which have been referred to, and the *dicta* on the subject, and notwithstanding what Lord *Eldon* says in *In re Wait* (2), that that matter had frequently disturbed his mind, as to the right of the sheriff to seize. The sheriff may seize the share of a partner. He cannot seize the table or the chairs in their entirety because the other party is entitled, but he is entitled to half of everything that is there, a half of what is seized as well as of that which is not seized. The interest which a partner can have in the partnership is, not a right to the chattels—not any order or disposition of them otherwise than under the partnership contract; nor is it suggested here that there was any holding out, or anything of that sort. Whatever the sheriff may do, he can only seize that to which the partner may be entitled—his ascertained share. The interest which the Respondent had was a *chose in action* and

(1) 1 Ves. Sen. 375.

(2) 1 Jac. &amp; W. 605.

something which could not be ascertained but by process of law ; and, in my opinion, his mortgage and his charge are perfectly valid, and he is entitled to have them paid out of the purchase-money which Sir *Allan Young* has contracted to pay. The appeal must be dismissed with costs.

C. J. B.

1878

*In re*

BAINBRIDGE.

*Ex parte*

FLETCHER.

Solicitors for Trustee: *Lewis, Munns, & Longden.*

Solicitors for *E. R. Bainbridge*: *Minet, Smith, & Co.*

*In re* WINTER. *Ex parte* BOLLAND.

C. J. B.

1878

“*Mutual Dealings*”—*Bankruptcy Act*, 1869, s. 39.

March 11.

One of the terms of an engineering contract was that the plant brought by the contractor on to the works should “be deemed the property of” the employers “for the time being,” and should “not be removed during the progress of the work without the written order of the engineer,” and that in case of suspension of the works by the engineer for any act or default of the contractor, the same should be “subject to be used” in and about the completion of the works. The works were suspended by the engineer, the contractor went into liquidation, and the works having been completed by the employers, the plant was by consent sold:—

*Held*, that the plant did not become the property of the employers, and that the user of the materials by the employers after the suspension of the works was not such a “dealing” within the meaning of the 39th section of the *Bankruptcy Act*, 1869, as that the employers were entitled to set off the value of the plant against the sum due to them from the contractor for breach of the contract.

THIS was an appeal from an order of the County Court at *Liverpool*.

Statement.

On the 28th of June, 1875, a contract for the execution of certain sewerage works for the Improvement Commissioners of *Llandudno*, for the sum of £20,581 15s. 6d., was entered into by *Benjamin Winter*, the bankrupt, and by the specification, which was made the ground of the contract, it was agreed, amongst other things, as follows:—

Sect. 31. “All steam-engines, pumps, machinery, materials, implements, tackle, timber for piling, shoring, poling, and strutting, tools, &c., brought by the contractor on to the works, shall be

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deemed the property of the urban sanitary authority for the time being, and shall not be removed during the progress of the work without the written order of the engineer; and in case of suspension of the works by the engineer for any act or default of the contractor, or of the work being taken out of the contractor's hands, the same shall be subject to be used, as shall be ordered by the engineer, in and about the completion of the said works."

On about the 5th of February, 1876, the engineer, under powers contained in the specification, suspended the further operation of the works.

An inventory was taken of the plant, tools, and materials left on the works; and shortly before the 7th of March, 1876, *Winter* filed a liquidation petition, under which *Henry Bolland* was appointed trustee.

In June, 1876, *Bolland* commenced an action against the Commissioners for damages and breaches of contract, and claiming £6972 4s. 9d. for work and materials.

The Commissioners undertook the completion of the works, and a letter of the 31st of January, 1877, addressed by the solicitor of the Commissioners to the solicitor of the trustees, stated as follows: "These works have so far progressed that the machinery (which the Commissioners have under the powers contained (*sic*) been using) has now done its work, and had the contract been completed, and no claim been made against the contractors by the Commissioners, might have been returned by them. As it is, they claim a lien on it."

In May the materials and plant were, by arrangement, sold by auction, and realized a net sum of £685 13s.

In November, 1877, the engineer made a report, whereby he found £2876 7s. 5d. to be due from *Winter*, as contractor, to the Commissioners.

On the 29th of January, 1878, a motion on behalf of the trustee for an order declaring that the above sum of £685 13s. was the property of the trustee, and directing payment of the same to him, was refused.

This was the order appealed from.

The contention of the Respondents, the Commissioners, was, to be allowed to retain the £685 13s. due from them to the trustee,

or to set it off against the £2876 7s. 5d. due from the trustee to them, on the ground that the property was in them, or if not, that there had been mutual dealings between them and the bankrupt within the meaning of the 39th section of the *Bankruptcy Act*, 1869.

C. J. B.

1878

In re

WINTER.

Ex parte

BOLLAND.

Argument.

R. Horton Smith, Q.C., and *W. H. Butler*, for the Appellant:—

Rose v. Hart (1), which was a decision under the mutual debts and credits clause of the 6 Geo. 4, c. 16, being sect. 50, with which sect. 171 of the Act of 1849 (12 & 13 Vict. c. 106) was identical, shews that the provision was confined to debts between the bankrupt and other persons, “or to transactions necessarily ending in debts;” and this decision of *Rose v. Hart* was fully recognised as a binding authority in *Naoroji v. Chartered Bank of India* (2), decided in May, 1868.

Then came the Act of 1869, which (sect. 39) for the first time introduces the phrase “mutual dealings.” The effect of this expression is discussed by Vice-Chancellor *Malins* in *Booth v. Hutchinson* (3); but though the decision shews that unliquidated damages (which by sect. 153 of the Act of 1861 were for the first time made admissible to proof) may be set off as a “mutual dealing,” it does not go so far as to say that a user of goods which does not end in a debt is admissible as a “mutual dealing”: *Robson on Bankruptcy* (4).

Hemming, Q.C., for the Respondents:—

How can it be said that this was not a “mutual dealing”? The goods were brought on to the ground, and it was provided that if the contract should be suspended they should be left to be used by the Commissioners. They might have been wholly consumed and used up.

Under the contract, moreover, they became the property of the Commissioners, and this right cannot be lost by any words picked out from their solicitor’s letter; or if not, the user of them was a mutual dealing within the 39th section.

(1) 2 Moore, 547; 8 Taunt. 499.

(2) Law Rep. 3 C. P. 444, 449.

(3) Law Rep. 15 Eq. 30, 33.

(4) 3rd Ed. p. 331.

C. J. B. BACON, C.J.:—

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In re

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I cannot entertain any doubt about this case.

The contract which was made is one of the most familiar kind. A contractor brings plant upon the works, and he undertakes that while he is engaged on the works it shall belong to the Commissioners, and that the things in question are to be deemed their property, that is to say, that they shall not be removed. He is entitled to the plant, because, if he is not, the property has passed from him. Under these circumstances he becomes bankrupt, having become a defaulter under the contract by the engineers, the authority which is constituted by the contract ascertaining that he owes the company £2876 for the default. In that state of things the bankruptcy happens. But when the bankruptcy happens he has got this plant, and it passes to his assignees as part of the estate. Looking to the very words used in the statute, what mutual dealing was there between the parties? Does the debtor give to the Commissioners any right to sell or retain this property? It was not in contemplation of the parties, and the Commissioners exercised no rights of ownership. The plant was to be deemed, for the purposes of the contract only, to be the property of the Commissioners. They had a right to use it if it was necessary to employ another contractor, but there is no dealing within the statute. In the case of *Booth v. Hutchinson* (1) there was a dealing which ended in money, because, there being default, the rent being due and payable by the creditor, he was entitled to set off £50 damages. In that case there were dealings between the parties, but where are the dealings in this? How have they ever dealt with the property? That is what I have to consider. This plant might have been protected against execution by this agreement—that it was to be deemed property that was to be left in the hands of the Commissioners for the purposes of the contract, but not with respect to the claims of the creditors of the contractor if he became bankrupt. The trustee finds it in the shape of goods, but he cannot turn it into money, so there is no question he takes it as chattels. That it does not come under the head of mutual debts is plain, and no one can say it comes under the

(1) Law Rep. 15 Eq. 30.

head of mutual credits, and unless it falls under the head of some "dealing" or other, it is within *Rose v. Hart* (1), and the other case cited, and it is not even within the 72nd section of the *Bankruptcy Act*. Can there be any question upon it? Could it be decided in any other way than that in which I am about to decide it?

I think that, although the £2876 is a debt owing to the Commissioners, they cannot retain this plant, because it is part of the bankrupt's estate. They cannot deduct the £685 which is now ascertained to be the value of this plant from the £2876, and there is no pretence or reason for saying that this plant, which was the property of the bankrupt, and was on these premises, did not become the property of the trustee. The Commissioners might have stipulated that it should not be removed, but if the trustee had removed it, he could only be liable to damages; it was still his unaffected by any dealings that took place respecting it.

The right of the trustee to have the value of these chattels is unaffected by any statement of debtor and creditor between the bankrupt and the company. The order of the Court must be discharged, and an order made that the trustee is entitled to the £685.

The Appellant will have his costs of the appeal; but I make no order as to the costs in the Court below.

Solicitors: *Owles*, agent for *Barrell & Rodway, Liverpool*; *Simpson & Co.*, agents for *J. William Hughes, Bangor*.

(1) 2 Moore, 547; 8 Taunt. 499.

C. J. B.

1878

In re

WINTER.

Ex parte

BOLLAND.

Judgment.

C. J. B.

In re GIBSON. Ex parte BOLLAND.

1878

March 11.

*Bill of Sale—Promise to give Bill of Sale to secure Repayment of Advance—
Undertaking to give Notice of Legal Proceedings—Execution of Bill of Sale
after Notice given of Legal Proceedings.*

1342 D 104

The debtor having borrowed £450 from a Mrs. *H.*, promised to give her a bill of sale for the amount when called upon to do so. In the following year Mrs. *H.* died, without having called for the bill of sale, and leaving the debt still owing. The debtor renewed his promise to Mrs. *H.*'s executor, and undertook to let the executor know if he was threatened with legal proceedings. Shortly afterwards he was threatened, and gave notice to the executor, who applied for a bill of sale, which the debtor then executed, including substantially all his property. It was registered on the following day, being the 2nd of June, 1877. On the 17th of July the debtor was served with a debtor's summons. He gave notice to the bill of sale holder, who on the 19th or 20th went into possession, and sold the goods on the 23rd:—

Held, that the bill of sale was fraudulent and void as against creditors.

Statement.

THIS was an appeal from one of the Judges of the *Liverpool* County Court.

In 1873, the debtor, *William Gibson*, a trader, borrowed £450 from a Mrs. *Hudson*, on the security of his verbal promise to give her a bill of sale when called upon to do so. *Gibson* paid interest on the money at £6 per cent. In 1874 Mrs. *Hudson* died. *Gibson* told her executors, *Frederick Chambers* and two other persons, that he had agreed to give the testatrix a bill of sale, and said, "I'll give a bill of sale whenever you require it." They did not ask for it at the time, and matters went on until 1877, when *Gibson* was served with a writ, and upon this coming to the knowledge of *Chambers*, he applied to *Gibson*, and on the 1st of June, 1877, a bill of sale of the whole of *Gibson*'s property, except about £50 of book debts, was by him executed to *Chambers* and the two other executors. The deed recited that the mortgagor was indebted to the mortgagees in the sum of £400 (£50 having been paid off), and that in order to secure the repayment thereof he had agreed to execute the indenture. There was no recital of the date of the advance, or of any past promise.

The instrument was duly registered on the following day, the 2nd of June, 1877.

On the 17th of July a creditor named *Latta* issued a debtor's summons, and served it on *Gibson*, who communicated the fact to *Chambers*, and on the 19th or 20th the holders went into possession under the bill of sale.

On Saturday, the 21st, the property was advertised for sale on the Monday following, the 23rd, and on that day the goods were sold, and realized between £160 and £180.

On the 16th of August *Gibson* was adjudicated a bankrupt on *Latta's* petition.

An application on behalf of *Henry Bolland*, the trustee, for an order that *Chambers* and the two other holders of the bill of sale should pay over to him the proceeds of the sale, was, on the 17th of January, 1878, refused by the Judge of the County Court.

This was the order appealed from.

The bankrupt, in cross-examination, said that when he named the service of the writ on him to *Chambers*, the latter asked if he had any other debt. Bankrupt said, "Nothing but what I would meet if they'd give me time to meet them." At the end of May he was not being pressed by any one. There were no writs. He further said, "At the end of last year (1876) I had made no balance-sheet. I knew that I was behind, but thought that I could pull up in the summer. It was never intended to put the bill of sale in force. It was understood that it was not to be put in force unless others were pressing me. There was only one bid at the sale . . . The things sold badly, and went much below their value . . . It was not properly advertised. It was through Mr. *Latta* pressing me. I told the holders of the bill of sale that I had been served with a debtor's summons, and I shewed it to them . . . I made the executors promises that if I got any legal process I would let them see it. I was served with the summons on the previous Tuesday. Mr. *Chambers* went to Mr. *Latta* to see whether he would stay proceedings under the summons. He would not do so, and then the property was sold. I told *Chambers* I was not able to pay the money required to be paid by the debtor's summons. When he could not persuade Mr. *Latta* to stay proceedings, he took possession of the property under the bill of sale."

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BOLLAND.Statement.
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GIBSON.
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Argument.

William Rann Kennedy, for the Appellant, the trustee:—

Was this deed a bill of sale within the terms of the agreement? It was not a result of the prior agreement. It was an assignment of substantially all the trader's property for an antecedent debt. The executors waited till about six weeks before the bankruptcy before they took the assignment. If the creditor waits whilst he believes the debtor to be solvent, and only when he believes him to be insolvent comes for the security, the Court will not support the deed.

Here the original promise was not absolute, only conditional: and there was no fresh advance: *Ex parte Fisher* (1).

Another objection fatal to the deed is the undertaking that the instrument should not be put in force until the debtor was in difficulties; and that the debtor would give the bill of sale holder notice. This amounts to fraudulent preference within the 92nd section of the *Bankruptcy Act*, as was said by Lord Justice *James* in *In re Wright* (2); it was tantamount to saying, I am about to become a bankrupt, come and take possession of the property before I do so.

The forced sale is evidence of a fraudulent transfer within sect. 6, sub-sect. 2, of the *Bankruptcy Act*, 1869: *Ex parte Pearson* (3).

Thomas Henry James, for the bill of sale holders, the Respondents:—

The deed did not include the whole of the debtor's property. There is no proof of an intention to bolster up the trader's credit. It was only when *Chambers* could not get *Latta* to stay proceedings that he went into possession. The case is within the decision of *Ex parte Izard* (4).

Gibson swears that there was no pressure on him on the 1st of June; all he wanted was time. The two things necessary to establish fraudulent preference are, voluntary payment on the part of the creditor, and contemplation of bankruptcy: *Ex parte Blackburn* (5). Here the act was not voluntary, having been done in

(1) Law Rep. 7 Ch. 636.

(3) Law Rep. 8 Ch. 667.

(2) 3 Ch. D. 70, 77.

(4) Ibid. 9 Ch. 271.

(5) Law Rep. 12 Eq. 358, 363.

pursuance of an agreement, which is sufficient to protect the transaction.

BACON, C.J.:—

The main question with which I have to deal is as to the validity of the bill of sale. The only way in which the bill of sale can be supported is upon the alleged agreement to give a bill of sale. Now upon the evidence it is clear it was not an agreement to give a bill of sale, but it was an offer made by the debtor to the lender of the money that he would give a bill of sale if she wished it. She did not wish it, nor was any bill of sale given during her lifetime, and there is no talk of any bill of sale until the critical month of June, when Mr. *Chambers*, one of her executors, hearing that the debtor was being pressed, went to ask him for a bill of sale, which was accordingly given. There was no present advance, no forbearance, nothing whatever that could assist the bankrupt to carry on his business—no consideration, except the past debt of £450, of which £50 had been paid off more or less punctually during the interval from the time of the loan in 1873 until the bill of sale was executed. That is not a good bill of sale. It would be directly repugnant to all principles of bankruptcy law to say that if a man contracts a debt in 1873, and says to the lender, I will give you as security a bill of sale, if you like, and the lender says, I will not take it unless you are pressed, and the lender dies, and then the executor comes and says, I must have security for this debt, and the bill of sale is accordingly given, that is a valid bill of sale. That is all that has to be decided in this case.

But that is not quite all that the Court is called upon to consider. It is bound to look into all the circumstances of the case to see if a just inference can be drawn from the facts that the intention was to give one of the creditors an advantage over the others by giving a bill of sale, and if such an inference can be drawn, it will set the deed aside. *Ex parte Fisher* (1) is an instance of that. In that case a man who had already borrowed £600 applied to the creditor for a further advance of £100, upon the promise that if he did not repay the £100 within ten days he would assign all his property to secure both the past and the

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In re

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(1) Law Rep. 7 Ch. 636.

C. J. B. fresh advance. The money was not paid, and a bill of sale was
 1878 accordingly given. The case came before me, and I was of
 ~~~~~ opinion that there was a sufficient fresh advance, and declared the  
*In re* bill of sale valid; but upon appeal my decision was reversed.  
 GIBSON. The Court of Appeal was right, and I was wrong. They found no  
*Ex parte* difficulty in holding that the bill of sale was for the purpose of  
 BOLLAND. securing the creditor in preference to the other creditors; and,  
 Judgment. preference being established, the bill of sale was good for nothing.

In the present instance there was no new consideration, and the offer to give a bill of sale was not accepted by the lady who advanced the money. She said in effect, I will not take your bill of sale now, because I must register it, and if I register it your credit will be destroyed. I will not give your future creditors notice of it, therefore I will not have the bill of sale. Then in June, 1877, comes Mr. *Chambers*, the executor, who is himself a creditor for over £162 of this debtor. The whole of the debts are only £400, and Mr. *Chambers*' claim is £162 of that—and he obtains a bill of sale, under what circumstances? With the distinct understanding between the two parties, and with a promise on the part of the debtor faithfully to perform his part of the contract, that if any creditor should press him, he was to give the bill of sale holder notice. He did do so, and the bill of sale holder took possession and sold the whole of the property the next day. I do not entertain the slightest doubt that such a transaction comes within the decisions on the subject, and if I were to hold that it was a *bonâ fide* transaction, it would be a most mischievous decision. The bill of sale is good for nothing, and I think the order which has been made refusing the trustee's application must be reversed. I understand that the things have been sold, and I shall limit the order to this—that the trustee is entitled to a declaration, that the proceeds of the sale of the property sold by Mr. *Chambers* belong to the trustee, and that it is to be paid over to him.

The appeal must be allowed.

Solicitors for the Appellant: *Owles*, agent for *Barrell & Rodway*, *Liverpool*; *Burton, Yeates, & Hart*, agents for *Tyrer, Kenion, & Tyrer*, *Liverpool*.



ODESSA TRAMWAYS COMPANY *v.* MENDEL.

[1876 O. 19.]

*Specific Performance—Divisible Contract—Performance of Part—Agreement in part legal and in part illegal—Fraud—Ultra Vires.*

C. A.

1877

FRY, J.

June 18.

C. A.

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Feb. 22, 23.

An action was brought by a company for the specific performance by the Defendant of an agreement which he had entered into to take 2000 £10 shares in the company, and pay for them in such numbers and at such times as should be required for the purposes of the company. His name had been placed on the register of shareholders, and a call had been made upon him which he refused to pay. Contemporaneously with the agreement to take the shares the board of directors had agreed with the Defendant to pay him £4000 in consideration of services rendered by him to the company. This sum was to be paid twelve months after the shares should have been paid for in full. The directors afterwards called on the Defendant to pay up the full amount of 1000 of his shares, which he refused to do. The Defendant alleged that the two agreements formed really only one contract for the issue of the shares at a discount; that he had not rendered any services to the company; and that the contract was divided into two parts for the express purpose of evading a provision of the company's articles of association which prohibited the directors from issuing shares at a price below par without the consent of a general meeting. No such consent had been given to the contract with the Defendant:—

*Held*, that, as the Defendant had acted in collusion with the directors to defraud the company, he could not be heard to set up this fraud for the purpose of making invalid the agreement, which was *ex facie* valid, to take and pay for the shares:

That as the parties had contemplated a piecemeal performance of the one agreement, the Court could compel the performance of a part:

That, in the absence of any proof of *mala fides*, the resolution of the directors to call up the amount of the shares was conclusive evidence that the money was required for the purposes of the company.

Specific performance of the agreement to take and pay for the shares was accordingly decreed.

The decision of *Fry, J.*, affirmed.

THIS was an action for the specific performance by the Defendant of an agreement by him to take and pay for shares in the *Odessa Tramways Company, Limited*. The company was incorporated, by registration under the *Companies Acts*, 1862 and 1867, in December, 1875, for the purpose of adopting and carrying into effect an agreement for the purchase of a concession, granted by

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the municipality of the city of *Odessa*, in *Russia*, of the right to construct and work certain tramways in the city and suburbs of *Odessa*. The capital of the company was fixed at £360,100, divided into 36,000 shares of £10 each, and 100 founders' shares of £1 each.

Clause 10 of the articles of association was as follows:—"The board may at any time, and from time to time, issue or dispose of any of the share capital for the time being unissued, to such persons, in such proportions, and at such price at or above par as the board may think fit, but no shares shall be issued at a price below par without the consent of a general meeting."

Clause 36 provided: "The board may from time to time, if they think fit (provided that the option is, in the first instance, offered without preference to all the members), receive from any of the members willing to advance the same all or any part of the moneys due upon their respective shares beyond the sums actually called for, and the amount for the time being paid in advance of calls shall bear interest at such rate as shall be determined by the board, not exceeding 10 per cent. per annum."

By clause 37: "The board may also in like manner, and without prejudice to any other power given to them by the statutes" (meaning thereby the *Companies Acts*, 1862 and 1867, and any other Act in force concerning joint stock companies and necessarily affecting the company) "or these presents, do either or both of the following things:—

"(1). Make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid, and in the time of the payment of such calls.

"(2). Pay dividend in proportion to the amount called and paid up on each share, in cases where a larger amount is called and paid up on some shares than on others."

The company did not succeed in getting many of their shares subscribed for by the public, and for the purpose of raising capital an agreement in writing was on the 4th of January, 1876, entered into between the company of the one part, and the Defendant, *Alexander Mendel*, of the other part, whereby it was agreed as follows:—

"(1). The said *A. Mendel* shall subscribe for 2000 shares in

the company, which shall be taken up and paid for in full by him in such numbers and at such times as shall be required for the purposes of the company.

“(2). In consideration of the said *A. Mendel* so subscribing and paying for the said shares the company agrees to give to the said *A. Mendel* the option of subscribing for 15,000 further shares in the company (being part of the first issue) at their par value, such option to be exercised as regards 5000 shares part thereof within eighteen months from the date hereof, as regards 5000 shares further part thereof within two years from the date hereof, and as regards 5000 shares, being the remainder thereof, within three years from the date hereof. The company shall have the right of disposing of any of the said shares not subscribed for by the said *A. Mendel* within the times above mentioned.

“(3.) The said *A. Mendel* may, as regards all or any of the shares referred to in the preceding paragraph, either pay for the same in full, or pay such an amount in respect of such shares as shall be then called up in respect of each of the other shares issued by the company.”

This agreement was adopted by a resolution of the board of directors passed at a meeting on the 4th of January, 1876. *Mendel* was present at the meeting, and the agreement was then signed by him and by the secretary on behalf of the company. It was also resolved that his name should be entered in the company's register of shareholders as the holder of 2000 shares. At the same meeting the following resolution was passed: “That the letter addressed to Mr. *Mendel* by the company engaging to pay him the sum of £4000 in consideration of his services be signed by the secretary of the company and handed to Mr. *Mendel*.” On the same day this letter was handed to *Mendel*. It was as follows:—

“Dear Sir,—By a minute of the board passed at a meeting held this day it has been agreed to pay you the sum of £4000 in consideration of the services rendered by you in connection with this company. This sum is to be paid by a draft or drafts to be drawn by you on and accepted by the company, payable twelve months after date, and to be dated on the day when you shall

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have paid in full for the whole of the 2000 shares of the company which have been subscribed for by you.

"Yours faithfully,

"(Signed) *E. M. Fraser*, Secretary."

A few days afterwards *Mendel's* name was entered on the company's register of shareholders as the holder of 2000 shares on which nothing had been paid. On the 6th of March, 1876, the board of directors passed a resolution that *Mendel* be called upon to pay £10,000, part of the amount payable upon the 2000 shares agreed to be taken by him and to be paid in full, the same being required for the purposes of the company.

On the 8th of March, 1876, the secretary of the company wrote the following letter to *Mendel*:—

"Dear Sir,—The directors desire me to request that you will be good enough to remit within ten days from this date the sum of £10,000 in respect of 1000 of the 2000 paid-up shares to be subscribed for by you under your agreement with the company of the 4th of January last. The directors desire me further to state that it is probable the balance will be required in the course of two months.

"I am, dear Sir,

"Yours faithfully,

"(Signed) *E. M. Fraser*, Secretary."

On the 16th of March *Mendel* wrote the following letter, addressed to the directors of the company:—

"Gentlemen,—Yours of 8th inst. came here to hand, and I had made my arrangements to pay you to-morrow £10,000 against 1000 shares paid up of your company to be taken by me. I have been advised not yet to take up any shares as long as the transfer of the concession to you is not entirely settled. The concession is, as I am informed, transferred to you, but that transfer is not ratified by the Russian Government by the sanction of your company as necessary. It is absolutely wanted that the municipality of *Odessa* applies in *St. Petersburg* for that ratification or admission of the English company. Without this your company has no legal existence nor any rights in *Russia*. I hear this formality won't take long time to be obtained. I hope to be in



the opportunity to discuss matters verbally with you in a few days.

“I am, Gentlemen,

“Yours faithfully,

“(Signed)      *A. Mendel.*”

Further correspondence ensued, in the course of which *Mendel* said that he could not consider himself any longer bound to take up shares in the company, and he declined to pay the £10,000.

On the 9th of May, 1876, the company commenced this action. They alleged in their statement of claim that on the 8th of March, when they called for the £10,000, they required it for the purposes of their undertaking, and that they had been unable to proceed with it, and had been seriously injured by reason of the Defendant repudiating his part of the agreement. They claimed specific performance by the Defendant of his part of the agreement of the 4th of January, 1876, or damages to the amount of £20,000.

By his statement of defence *Mendel* alleged that the agreement of the 4th of January, 1876, and the resolution of the board of the same date as to the payment of £4000 to him for his services, really formed in effect one agreement for the issue of shares to him at a discount of 20 per cent., and that he had never rendered any services to the company. The agreement was never sanctioned by a general meeting of the company, and was therefore *ultrà vires* and void. He also said that it was a condition precedent to his subscribing for shares that the company should be in a position at once to proceed with the construction of the first section of the tramways, and this they could not do because they had not obtained the license of the Russian Government to trade in *Russia*. The Defendant also alleged that when the call was made on him the application was not made *bonâ fide*, that the money was not really required for the purposes of the company, that the company had proved a complete failure, and that there was no hope of their ever carrying out the purposes for which it had been formed. By way of counter-claim he asked to have his name removed from the company's register of shareholders.

The Plaintiffs, in their reply, denied that the application to the Defendant was not *bonâ fide*, and said that the company had

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proved a commercial failure in consequence of the Defendant not performing his agreement.

The action was tried before Mr. Justice *Fry* on the 18th of June, 1877.

*Cookson, Q.C., Kemp, Q.C., and J. C. Mathews*, for the Plaintiffs :—

The Defendant has shewn no reason why the agreement should not be performed.

*North, Q.C., Romer, and F. H. Lewis*, for the Defendant :—

In the first place, the two agreements were really one arrangement for the issue of shares at a discount. It was divided into two agreements for the purpose of evading the prohibition of clause 10 of the articles of association. No services had been rendered by the Defendant to the company ; the £4000 was really a discount from the price of the shares. The whole arrangement was *ultra vires*, and the Court will not enforce the performance of a part of it.

[*FRY, J.*, referred to *Wilkinson v. Clements* (1).]

When the agreement is really one the Court will not be blinded by merely a colourable separation. The evidence shews that there was one agreement that he should take the shares at an abatement of price, and this agreement was afterwards carried into effect by the two separate agreements. The object of the separation was to avoid difficulties with the shareholders, to avoid shewing on the minutes that the directors were doing what they were not authorized to do. They might be acting in good faith, though they were attempting to do that which was *ultra vires*.

Secondly. The obtaining of the sanction of the Russian Government was a condition precedent to the requiring payment of the money. The money was to be called for only when required for the purposes of the company, and those purposes could not be effected until the sanction of the Russian Government was given.

Thirdly. The directors were not authorized to make calls in this way on one shareholder alone. All the shareholders must be treated alike. Clause 37 of the articles does not justify the making of this call.

(1) Law Rep. 8 Ch. 96.

*Cookson*, in reply, upon the question of the validity of the agreement only :—

The two agreements are several in form as well as in the mode in which they are to be carried out. The bills for the £4000 are not to be accepted until the Defendant has paid up the whole of the £20,000 for the shares, and then they are not to be payable for a year. This interval of time prevents the agreement, if it is one, from being an agreement for the issue of shares below par. We are only asking now for the payment of £10,000. Moreover, clause 10 of the articles only imposes a restriction on the powers of the directors. It is the company who are now seeking to enforce the agreement. The Defendant, who was aware of the restriction, cannot take advantage of an agreement *ultrà vires* the directors, and he cannot repudiate his own agreement. The company may adopt the agreement by the Defendant to take the shares, and he cannot set up the collateral qualification of it. We are not bound to shew that the Defendant rendered services to the company.

FRY, J. :—

The construction of the agreement does not appear to me to be open to any difficulty. Mr. *Mendel* agrees immediately to subscribe for 2000 shares. He agrees to take up and pay for those shares in full, in such numbers and at such times as shall be required for the purposes of the company. Now I think that, at any rate *primâ facie*, the persons who are to determine whether the shares are required to be taken up for the purposes of the company are the managing body, the directors of the company. Then the next clause of the agreement gives Mr. *Mendel* the option of taking 15000 further shares at par at certain specified times, and it gives the company the right of disposing of any of those shares which he may not take up at those times respectively. That carries with it, in my opinion, a clear obligation on the part of the company to retain a sufficient number of shares to answer the option up to the respective times at which it is to be exercised; and afterwards they may dispose of them. The considerations for the agreement are abundant on each side. And then, by the third clause, the agreement gives to *Mendel* the option of paying for the

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15,000 shares in full, if he so thinks fit, or of paying "such an amount in respect of such shares as shall be then called up in respect of each of the other shares issued by the company," if he prefers that mode of payment.

[His Lordship then referred to the resolution of the 4th of January, 1876, the entry of *Mendel's* name on the register, and the resolution of the 6th of March, 1876, and continued:—]

There was, therefore, a conclusion come to by the proper persons that £10,000 was required for the purposes of the company. It has been suggested that it was not really so required, but that suggestion does not prevail with me, because it appears that the company were proceeding or were intending to proceed with their works at *Odessa*, and they might well, therefore, require the sum of £10,000 for that purpose. It is not proved to my satisfaction that the company had abandoned the intention of carrying their works into effect. I therefore come to the conclusion that the money was really required for the purposes of the company, and there is certainly nothing to induce me to conclude that they passed this resolution *malâ fide*.

Mr. *North* and Mr. *Romer* have argued three points before me with regard to the agreement. The first point arises on the 10th clause of the articles of association of the company. It is said that the letter of the 4th of January, 1876, from the secretary of the company to Mr. *Mendel*, by which the company agreed to pay him £4000 in consideration of services rendered by him in connection with the company, was written contemporaneously with the agreement, and it is said by Mr. *Mendel* that he had never rendered any services to the company, and for aught I know that statement may be true. He says, further, that this letter was written in pursuance of an arrangement or an agreement between him and the directors of the company that they should in effect collude together for the purpose of making a bargain in itself bad, because it violates the provision of the 10th clause of the articles of association that shares should not be issued at a discount, while at the same time it should appear to be good, and by which Mr. *Mendel* should get £4000 from the company as payment for services rendered, when he had, in fact, never rendered any service whatever to the company. That was the arrangement which he says

he came to with the chairman of the company, and his counsel have asked me to conclude upon the evidence that this arrangement was adopted by the other directors of the company. Now I am bound to admit that the collocation, in point of time, of the two transactions affords very great colour to the argument, and I will assume, for the purposes of my judgment, that Mr. *Mendel's* counsel are right in so arguing. And it appears to me that it may very well follow from that that the directors may be advised that the letter of the 4th of January, containing, as Mr. *Mendel* now alleges, a misstatement of facts, cannot give rise to any legal obligation on the part of the company, and that Mr. *Mendel* may find that he will never be entitled to the bills for £4000, or to payment of those bills if they are issued. That may or may not be the case, and I say nothing more about it now.

But the present question is whether I can listen to Mr. *Mendel's* assertion that he has colluded with the agents of the company for the purpose of defrauding the company. I say "defrauding the company," because it is a fraud on the company to agree that he should receive £4000 for services rendered to the company, if he never rendered any services at all. I am asked to hold the two agreements, viz., the one contained in the letter of the 4th of January, 1876, and the other in the formal agreement of the same date, to be parts of one and the same transaction in order that Mr. *Mendel* may say that they are *ultra vires* the directors. I decline to do that. I think that where a transaction, taking it in its entirety, would be bad, but the agent of one of the parties to it has colluded with the other party for the purpose of putting the agreement into such a form that the valid part shall be separated from the invalid part, then that which is *intra vires* may be separated from that which is *ultra vires*: in other words, that which is honest and true may be separated from that which is dishonest and false, and the principal of the agent who has been party to the fraud may say to the other party whom he sues, "You have agreed that that which was originally commenced as one negotiation shall result in two separate agreements, and you having so agreed, I will now take you at your word, and I will enforce so much of the agreement as is contained in the valid separate document upon which

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I sue, and I will leave the other part of the agreement alone." That seems to me to be the true view of the course of conduct which Mr. *Mendel* says he has pursued, if it is looked at with regard to the doctrine of *ultra vires* independently of fraud. But the case appears to me to be still stronger when the Defendant himself comes forward and says, "I colluded with your agent when he agreed that you should pay me £4000 upon a false and fraudulent representation that services had been rendered to you by me, when in fact none were rendered." And I think that as against the person who sets that up as the real history of the transaction, I ought to separate the rest of the agreement from the fraudulent and false part of it, and allow the principal with whose agent the Defendant has fraudulently colluded to enforce the performance of that separate part of the agreement.

I think, too, I might well come to the same conclusion, irrespective of the principles applicable to the doctrine of *ultra vires* and to fraud, and for this reason, that where it is apparent on the face of even a single agreement that the parties intended that it should be carried into effect piecemeal, then a default in the performance of one part of the agreement is no defence to an action for the specific performance of another part. I find a negotiation which is said to have been commenced for one agreement, and that the parties have agreed to separate it into two distinct parts, and I infer that they have done so for the good and valid reason that they desired that the one part should be enforceable even if the other was not. Even upon that ground, irrespective of the doctrines of *ultra vires* and of fraud, I think I may properly and rightfully enforce the one part of this agreement without attending to the objections raised to the other part, viz., that which is embodied in the letter of the 4th of January.

Two other observations may be made with the view of strengthening the conclusion at which I have arrived—that the one part of the agreement may be treated separately from the other part. The first is that the £4000 is not to be paid until twelve months after the £20,000 has been paid. The other is that the £4000 may never become payable at all, because it is quite possible that the whole of the £20,000 may never be called for, and in that

case the £4000 will never become payable. According to the argument of Mr. *Mendel's* counsel, if the £20,000 is not required for the purposes of the company, it can never be called up, and therefore a state of circumstances may arise in which the directors will not have power to call up the £20,000, and the £4000 may therefore never become payable. These observations appear to me to confirm the conclusion at which I have arrived independently of them.

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The second objection urged by Mr. *Mendel's* counsel was this—that it was a condition precedent to his subscribing for the shares that the company should be in a position at once to proceed with the construction of the first section of the tramways. I asked Mr. *North* whether he put that as the result of the construction of the agreement, and, if I understand him rightly, he said that, looking at the surrounding facts, he did. He said that the company may never be able to hold the concession, or to carry into effect their objects, unless they obtain the consent of the Russian Government. But I am clearly of opinion that the obtaining of the consent of the Russian Government is not a condition precedent to the payment of the £20,000. If anything could shew that more plainly than the silence of the agreement, it would be this, that the £20,000 may be required for the very purpose of obtaining that consent which is said to be a condition precedent to the payment of the £20,000.

Then the third objection was this: that the agreement puts the Defendant upon special terms with regard to the times at which he is to pay up the £20,000, and, to use Mr. *North's* language, all the shareholders must be treated alike with regard to calls. It appears that the other shareholders have not had calls made upon them, and therefore it is said that no call can be made upon Mr. *Mendel*. But the 37th clause of the articles of association enables the board of directors to agree with a particular shareholder to put him in a different position from the other shareholders with regard to the amount of calls, and the times at which they are to be paid. Mr. *Mendel* has agreed to pay the calls upon the 2000 shares in full, “in such numbers and at such times as shall be required for the purposes of the company.”

C. A. That appears to me to be completely justified by the 37th clause of the articles.

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My judgment, therefore, is that the Defendant do specifically perform the agreement of the 4th of January, 1876, so far as it remains to be performed by him, and that he do pay the costs of the action.

C. A. From this decision the Defendant appealed. The appeal came on to be heard on the 22nd of February, 1878.

Argument.

North, Q.C., and *Romer*, for the Appellant:—

The two agreements were parts of one arrangement, and cannot be separated; and as one part was *ultra vires* the other part cannot be enforced.

[JAMES, L.J.:—We are all of opinion that the two agreements are separable. They were intended by the parties to be separated, and they must be so dealt with.]

Then we contend, secondly, that it was a condition precedent to the Defendant subscribing for the shares that the Plaintiffs should obtain the license of the Russian Government. The money was not to be called for until it was required for the purposes of the company. The Plaintiffs have not shewn that it was so required, and, indeed, it could not be required until the license of the Russian Government was obtained. The Plaintiffs themselves admit in their reply that the company is a commercial failure.

Thirdly, if the money was wanted for the purposes of the company the directors were not authorized to make calls upon one shareholder alone, nor to call on the Appellant to pay the whole on some shares and nothing on others.

Cookson, Q.C., and *J. C. Mathews*, for the Plaintiffs, on the question whether the Defendant could raise the objection that the money when called for by the directors was required for the purposes of the company, referred to *Foss v. Harbottle* (1).

Judgment, C. A. JAMES, L.J.:—

In my opinion the appeal cannot be supported. The Defendant

(1) 2 Hare, 461.

entered into an agreement, which was very specific, that he would subscribe for 2000 shares, and that he would take them up in such numbers and at such times as should be required for the purposes of the company. After that agreement the directors could not allot the 2000 shares to any one else. They were in fact allotted to him. Then, he having agreed to take them up in such numbers and at such times as should be required for the purposes of the company, the directors call up some of them for the purposes of the company. The only defence which he could make to that call would have been that the call was made *malâ fide*. That defence is not raised in the present suit. There is no evidence in support of such a case. We cannot in this suit try the question whether the directors asked more than they wanted, or whether they wanted to use it in this way or the other. We cannot try whether that money was really wanted for the purposes of the company. It is similar to the cases, in which we always refuse to interfere, where the question is raised whether land proposed to be taken by a railway company is really required for the purposes of the company. The Court cannot in such a case enter into a contest with the engineers whether the land is required or not. That must be decided by the proper authorities who are entrusted with the management of the company. It is incumbent on the other side to shew want of *bona fides*. In the same way, in the present case, the Defendant has agreed to subscribe for the shares when the money was wanted by the company, and we cannot try whether it is really wanted; we must take the decision of the directors. It was open to the Defendant to raise the defence of want of *bona fides*, but that defence is really not raised in this case. The appeal must be dismissed with costs.

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BAGGALLAY, L.J.:—

Baggallay, L.J.

I at first felt some difficulty as to the question whether the Defendant ought to have been on the list of shareholders at all; but that issue is not raised in this suit. I therefore see no reason to differ from the decision of Mr. Justice *Fry*.

THESIGER, L.J.:—

Thesiger, L.J.

I also agree that the appeal must be dismissed. The reason

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given for the agreement with the Defendant was that the directors were not able to get the shares taken by the public in open market, and for that consideration the Defendant agreed to take 2000 shares, and to pay the money whenever the directors called on him to do so for the purposes of the company. They have called on him to pay it, and he is bound to pay it unless he can shew *mala fides*. In the case of land required for a railway company, the Court cannot go into the question whether all the land is really required by the company, it must trust to the certificate of the engineers. So here, if the company say that the money is required for the purposes of the company the Defendant must pay, unless he can shew by actual proof that the money was not required. No such proof has been given in this case, and if the facts were gone into it would very likely turn out that it was really required.

Solicitor for Plaintiffs: *H. C. Godfray*.

Solicitors for Defendant: *Lewis & Lewis*.

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March 7.

Composition—Surety—Default in Payment—Payment in Part by Surety—Rights of Creditors and Surety—Election—Proof in Bankruptcy—Protected Transaction—Notice of Act of Bankruptcy “available for Adjudication”—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 11, 94, 95.

Where creditors agree to accept a composition payable in instalments, some of which are guaranteed by a surety, if default is made in the payment of any one instalment the creditors have a right to sue the debtor, or to prove in his bankruptcy, for the balance of their original debts, after deducting what they have received, either from the debtor or the surety, in respect of the composition, and not merely for the amount of the unpaid instalments of the composition.

And the surety, though he is entitled to prove in the debtor's bankruptcy for what he has paid in respect of the composition, has no right to put the creditors to an election whether they will carry out the composition arrangement *in toto* or reject it *in toto*.

The words “notice of an act of bankruptcy available for adjudication” in sects. 94 and 95 of the *Bankruptcy Act*, 1869, mean notice of an act of

16CLD 577
21CLD 607, 8

bankruptcy which would have been available for the making of the adjudication actually made, that is, an act of bankruptcy committed within six months from the presentation of the petition on which the adjudication was founded.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 19th of October, 1874, *Charles Bedell* filed a liquidation petition. The creditors at their first meeting, on the 17th of December, 1874, resolved to accept a composition of 7s. 6d. in the pound in satisfaction of the debts, payable as follows: 4s. in three months, 2s. in six months, and 1s. 6d. in nine months from the date of the registration of the resolution, the last instalment to be guaranteed by *H. P. Gilbey*. The composition was to be secured by the promissory notes of the debtor, to be dated on the day of the registration of the resolution, and to be delivered by the debtor to *James Glegg* for distribution among the creditors. Until payment of the composition the debtor was to carry on his business under the inspection of three persons who were appointed inspectors, and a deed of inspectorship was to be prepared. On the 21st of December, 1874, *Gilbey* executed a guarantee in the following terms:—"In consideration of the creditors of the above-named debtor passing an extraordinary resolution to accept a composition of 7s. 6d. in the pound in satisfaction of the debts due to the creditors from the said debtor, and that such composition be payable as follows: 4s. in the pound within three months from the date of the registration of the resolution, 2s. in the pound within six months from the date aforesaid, and 1s. 6d. in the pound within nine months from the date aforesaid, I agree to guarantee the due payment of the last instalment of such composition to Mr. *James Glegg* for the use of and to distribute to the several creditors." The resolution was confirmed at the second meeting of the creditors on the 31st of December, 1874, and was registered on the 26th of January, 1875. An inspectorship deed was executed on the 8th of March, 1875. It contained (*inter alia*) a proviso that, if *Bedell* should make default in payment of his promissory notes respectively as and when they should become payable, it should be lawful for the inspectors to apply to the Court of Bankruptcy to adjudge him a bankrupt, and that, in the

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event of his being adjudicated a bankrupt, before full payment of all the promissory notes, *Gilbey* should thereupon stand released from his guarantee. The deed was executed by some of the creditors. The first instalment of the composition was paid by *Bedell* when it became due, but he made default in payment of the second. On the 1st of October, 1875, two creditors, who were not bound by the composition, because their names had not been inserted in the debtor's statement of affairs, and who had not executed the inspectorship deed, presented a bankruptcy petition against him, founded on his non-compliance with a debtor's summons, and he was, on the 14th of October, 1875, adjudicated a bankrupt. After the adjudication the bankrupt made default in payment of the third instalment of the composition. *Glegg* then called upon *Gilbey* to pay it. *Gilbey* declined to pay, on the ground that, by virtue of the proviso in the inspectorship deed, he was released by the bankruptcy of *Bedell*. The Queen's Bench Division, however, decided that the proviso applied only to a bankruptcy procured by the inspectors under the provisions of the deed, and that *Gilbey* was not released: *Glegg v. Gilbey* (1), and this decision was affirmed by the Court of Appeal (2). *Gilbey* then paid the third instalment, and afterwards tendered a proof in the bankruptcy for the amount which he had thus paid. Some of the creditors who were parties to the composition resolutions also tendered proofs in the bankruptcy for the balances of their original debts, after deducting what they had received in respect of the first and third instalments of the composition. The trustee rejected *Gilbey's* proof, on the ground that, at the time when the bankrupt's liability to indemnify him was contracted, *Gilbey* had notice of the act of bankruptcy committed in the filing of the liquidation petition, and was therefore, by sect. 31 of the *Bankruptcy Act*, 1869, prohibited from proving. The Court of Appeal, however, held that this notice was not a bar to the proof, because the act of bankruptcy, having been committed more than six months before the presentation of the petition on which the adjudication was made, was not "available" for the making of that adjudication, and held that *Gilbey's* proof must be admitted: *Ex parte Crosbie* (3). *Gilbey* then applied to the Court of Bankruptcy

(1) 2 Q. B. D. 6.

(2) 2 Q. B. D. 209.

(3) 7 Ch. D. 123.

for an order directing the trustee not to admit a proof tendered by *D. H. Young* for £401 2s. 4d. (being the balance of the full amount of a debt alleged to have been due to *Young* by the bankrupt on the 19th of October, 1874, after deducting the amount of 4s. in the pound and 1s. 6d. in the pound received by *Young* as instalments of the composition), but only to admit the proof for such smaller amount and upon such terms as the Court should direct and as should be just. The Registrar dismissed the application with costs.

Gilbey appealed.

De Gex, Q.C., and *Crump*, for the Appellant:—

It is true that on default being made in payment of any one instalment of a composition the right of a creditor to sue the debtor for his original debt revives, but it revives only at the election of the creditor, and he must elect to abide by the composition arrangement *in toto* or to reject it *in toto*. If he elects to retain the instalments which he has already received, he can only sue the debtor (or prove in his bankruptcy) for the amount of the unpaid instalments. That the creditor is put to this election is shewn by the observations of *Lush*, J., in *Glegg v. Gilbey* (1). If the composition resolutions are only a conditional accord and satisfaction, still a creditor who had received promissory notes for instalments of the composition, and who afterwards claimed to be paid in full, would have to deliver up the promissory notes: *Ex parte Charlton* (2). If, on the default in payment of the second instalment, a creditor had sued the debtor for his original debt, less the first instalment, that would have discharged the surety. The surety gave the guarantee only on the faith of the arrangement being carried out in its entirety. He is entitled now to say, *non in hæc fœdera veni*.

[JAMES, L.J.:—What interest has the debtor or his estate in this question?

BRETT, L.J.:—The logical result of your argument is, that the third instalment ought to be paid back to the surety.

JAMES, L.J.:—There is no ground for attributing any one instalment to any particular part of the debt.]

(1) 2 Q. B. D. 13.

(2) 6 Ch. D. 45, 53.

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Ex parte Ellis (1) and *Latter v. White* (2), are authorities in favour of our argument.

Moreover, the creditors who received the first instalment from the debtor received it with notice of the act of bankruptcy committed in the filing of the liquidation petition, which was within twelve months before the order of adjudication. Consequently, the title of the trustee relates back to it: *Bankruptcy Act*, 1869, s. 11: and the first instalment ought to be refunded to the trustee. Sects. 94 and 95 do not protect the payment, for there is no reason for limiting the meaning of the words "notice of an act of bankruptcy available for adjudication," as they were limited with reference to sect. 31 in *Ex parte Crosbie* (3), to an act of bankruptcy committed within six months before the presentation of the petition on which the actual adjudication was made. The *ratio decidendi* of *Ex parte Crosbie* does not apply to the present case. If, in sect. 31, the limit of six months was not imposed, there would be no limit at all; but sect. 11 carries back the title of the trustee only for twelve months from the order of adjudication. There is, therefore, no reason for reading the words "notice of an act of bankruptcy available for adjudication," in sects. 94 and 95 in any other than their natural sense, that is, as meaning an act of bankruptcy available for adjudication at the time when the payment was received by the creditor. The same words may well have a different meaning in different sections of the Act: *Ex parte Kemp* (4).

Winslow, Q.C., and *Northmore Lawrence*, for the trustee, and

H. W. Lord, for *Young*, were not heard.

Judgment,
James, L.J.

JAMES, L.J.:—

I am of opinion that the decision of the Registrar must be affirmed. With regard to the construction of the words "notice of an act of bankruptcy available for adjudication," in sects. 94 and 95, I think we must construe them in exactly the same way as we did in favour of Mr. *Gilbey* in our former decision in *Ex parte Crosbie* with reference to sect. 31, i.e., as meaning an act of

(1) 2 Mont. & A. 370.

(3) 7 Ch. D. 123.

(2) Law Rep. 6 Q. B. 474.

(4) Law Rep. 9 Ch. 383.

bankruptcy which would have been available for the making of the adjudication which has been actually made. We held that, where the adjudication had not been made for more than six months after the commission of an act of bankruptcy, that act of bankruptcy was not one "available for adjudication" within the meaning of sect. 31. There the question was as to the right to prove against the bankrupt's estate, and I think the same principle must apply to an attempt to recover back money paid by the bankrupt under the composition arrangement. I see no reason for applying a different rule of construction now.

With regard to the main question, the right of a creditor to prove for the whole amount of his original debt, less what he has actually received, I cannot understand how, upon any legal principle, that right can be questioned. The question now to be determined is not one between Mr. *Gilbey* and the creditors; that question was settled in a distinct action. The question which now arises is one between the creditors and the bankrupt's estate. We have not now to deal with any right of Mr. *Gilbey* as surety, but with his right as a creditor of the bankrupt. It has been decided over and over again that a mere agreement for a composition is not an accord and satisfaction of the debts, unless it is expressly provided that it shall be. In order to defend an action by a creditor for his debt, the debtor is bound to shew that the composition was paid, or that he was ready and willing to pay it at the time appointed. If he cannot do this, the creditor's right to sue him for the original amount of his debt revives. If the right of action is unaffected, how can the right of proof, which is commensurate with the right of action, be diminished? Of course, the creditor who seeks to prove must give credit for whatever he has received, but it can make no difference that he has received it in respect of a composition. In whatever mode he has received it he must give credit for it. But, if default is made in payment of the composition, the creditor's legal right revives to sue for the whole sum originally due to him, less what he has in fact received.

BRETT, L.J.:—

Upon the main question the case stands thus:—A composition agreement is made between a debtor and each of his creditors that

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if the debtor will, at three specified times, pay three specified sums of money to each of his creditors, and the other creditors will agree to accept those payments, the original debt shall, if the conditions be fulfilled, be released. It has been held over and over again that, if there is nothing more than this, the agreement does not amount to an accord and satisfaction by the creditor, and that, if the debtor fails to pay any instalment of the composition, the right of the creditor revives to sue for his original debt, less what he has received in respect of it. If there were no surety it would be clear that the creditor would be entitled to prove in the bankruptcy for the whole amount of his original debt, less what he has received. But a surety is brought into the arrangement, and he undertakes to pay the third instalment of the composition in case the debtor does not. The surety has paid the third instalment, and it is said that the contract with him will be altered if the creditors are now allowed to prove for what remains unpaid of their original debts. It seems to me, however, that the surety must be taken to have contracted subject to the known rule of law by which, if the debtor fails to pay the composition, the creditors are remitted to their old debts. The surety has contracted, subject to that rule of law, that, if the debtor does not pay, he will do so, and I cannot see that his position or the consideration for which he undertook to pay will be in any way altered. Upon the other point I have nothing to add to what the Lord Justice has said.

Thesiger, L.J.

THESIGER, L.J.:—

I am of the same opinion. This is not a case where the surety has contracted to pay 1s. 6d. in the pound in consideration of the creditors agreeing to accept the debtor's promise to pay 7s. 6d. in the pound. But the contract is, that, in consideration of the creditors passing a certain resolution to accept a composition of 7s. 6d. in the pound payable in three instalments, the surety guarantees the payment of the last instalment. In order to see what the consideration for the guarantee is, we must look at the resolution. It is an ordinary composition resolution, and it provides for the payment of the composition in three instalments, and that the arrangement should be carried into effect by a deed. As incident to that arrangement there was implied that which is always

implied in such cases, that, in the event of any one instalment not being paid when it became due, the original debts should revive. The consideration for the guarantee is equally fulfilled by the passing of the resolution, even if default is made in payment. So long as the creditors give credit for the sums which have been actually paid to them, whether by the debtor or by the surety, there is nothing of which the surety has a right to complain. But, independently of that, I think that the question which is now raised ought to be raised, if raised at all, in the form of a claim by the surety to recover back from the creditors what he has paid them, and I cannot see that he has any right to prevent them from proving against the bankrupt's estate. And if that be so, it must be competent to them to say, "We have received certain sums in respect of our debts, for which we are willing to give credit," and the present application is really to prevent them from doing that. The decision in *Glegg v. Gilbey* (1) was that this bankruptcy was not such a one as, by the terms of the inspectorship deed, released the surety from his liability, and it seems to me to follow almost as a corollary from that decision, that the surety cannot have a right to recover back from the creditors that which he has paid them; *à fortiori*, he has no right to prevent them from proving in the bankruptcy for the whole amount of their original debts, less what they have received in respect of them.

The appeal was dismissed, with costs.

Solicitor for Appellant: *V. I. Chamberlain*.

Solicitors for Trustee: *Lewis, Munns, & Longden*.

Solicitors for Creditors: *Sorrell & Son*.

(1) 2 Q. B. D. 13.

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March 8.

In re MARMAN'S TRUSTS.

Maintenance of Pauper Lunatic—Jurisdiction—Payment to Legal Personal Representative of Lunatic—16 & 17 Vict. c. 97, ss. 94, 104.

M. a pauper lunatic in an asylum at *Bethnal Green*, but not found lunatic by inquisition, became entitled to a small fund in Court. An order was made in 1856 on petition under the *Trustee Relief Act*, by *M.* by his next friend, directing that he should continue at the asylum until further order, and, the guardians of the poor of his parish undertaking to maintain him there, that £31 a year should be raised out of the fund and paid to the guardians in repayment of the sums to be expended in his maintenance. In 1859 he was removed to the new asylum for his county by order of the justices, but without any order of the Court of Chancery. From this time no payments were applied for by the guardians. He remained in the County Asylum till his death in 1875. His legal personal representative petitioned for transfer of the funds in Court to him. The guardians appeared and claimed maintenance for the past time:—

Held, that the guardians could not claim maintenance under the order, which ceased to be operative on the lunatic's removal to a fresh asylum:

Held, also, that any claim for maintenance independently of the order was merely a debt of the lunatic, payable by his personal representative in due course of administration, and that the Court had no jurisdiction in the matter to order payment of it, but that the whole fund must go to the personal representative.

Statement.

IN 1844, *John Moore*, a person of unsound mind, not so found by inquisition, and being a pauper chargeable to the parish of *Brighton*, was, under an order of justices, placed in the lunatic asylum of *Warburton & Co.* at *Bethnal Green*.

In 1855, *Moore* having become entitled to a fund which had been paid into Court under the Act for the relief of trustees by the executors of *Mary Marman*, a petition was presented in his name by his next friend, upon which, on the 14th of November, 1855, an order was made for payment to the treasurer of the guardians of the poor of *Brighton* of a sum of money for the past maintenance of *Moore*, and an inquiry was directed what provision ought to be made for his future maintenance out of the residue of the fund. After the payments directed by this order the fund was £436 15s. 5d. consols.

By an order made on the 25th of July, 1856, it was ordered that *Moore* should continue in *Warburton's* asylum till further

order, and, the guardians of the poor of *Brighton* consenting thereto and agreeing to maintain and clothe *Moore* at the said asylum at the annual charge of £31 4s., it was ordered that £31 4s. should be allowed for his maintenance and clothing for the year ending the 25th of June, 1856, and that the yearly sum of £31 4s., from the 25th of June, 1856, should be allowed for his future maintenance and clothing during his life, or until further order. Directions were given for payment of the £31 4s. for the past year, and the costs, out of the fund; and, the guardians consenting, it was ordered that on or after the 25th of June, 1857, and on or after the same day in each succeeding year during the life of *Moore*, or until further order, so much of the residue of the consols from time to time standing in trust in the matter, as with any cash arising from dividends thereon, would be sufficient to raise £31 4s., should be sold, and that the moneys to arise from such sales should be from time to time paid to the treasurer of the guardians for the time being in repayment of the sums to be expended in the maintenance and clothing of *Moore*.

Moore continued at *Warburton's* asylum till 1859, when he, along with a number of other pauper lunatics from *Sussex*, was by order of two justices of the county of *Sussex*, under the powers given by 16 & 17 Vict. c. 97, s. 77, but without any order of the Court of Chancery, removed to the new *Sussex* County Asylum at *Hayward's Heath*, where he remained till his death, which took place in March, 1875. While there he was maintained at a less expense than £31 4s. a year.

The order was acted upon down to August, 1858, when the guardians received maintenance down to June, 1858. After this no payment was received by the guardians.

After the death of *Moore* his personal representative petitioned for transfer and payment of the funds in Court, amounting to £355 14s. 2d. consols, and £187 14s. cash. The guardians, who were served with the petition, asked for payment of what they had expended on *Moore's* maintenance since June, 1858. Vice-Chancellor *Bacon*, on the 2nd of August, 1876, directed taxation, and payment out of the fund, of the costs of both parties, and ordered transfer and payment of the residue to the Petitioner. The guardians appealed.

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C. A. *Swanston, Q.C., and Walter Renshaw, for the Appellants:—*

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The spirit and object of the order of 1856 were that maintenance out of this fund up to a given amount should be allowed to the guardians, and if the insertion of the words "or at such other asylum as the justices shall direct" had been asked for, they would have been inserted as a matter of course. The Court is not bound to construe the order so strictly as to defeat its object. At all events, under 16 & 17 Vict. c. 97, ss. 94, 104, we are entitled to have the amount repaid which we have expended.

Hemming, Q.C., and Freeman, contra:—

The order of 1856 was an order for payment of the expenses of keeping the lunatic at a specified asylum approved of by the Court. We do not say that there was any contempt in not applying to the Court to sanction the removal of the lunatic, but we say that the order was put an end to by such removal. The claim for a *quantum meruit* is better founded, but cannot be brought forward here; it is a mere claim for a debt against the legal personal representative. There is no lien, and a creditor could in no case recover more than six years' arrears; and in the case of such a claim by guardians of the poor, the period of limitation is still shorter. The nature of the jurisdiction of the Court over property of persons of unsound mind is very clearly explained in *Beall v. Smith* (1). The owner being incapable of managing his own property, the Court authorizes the trustee to deal with it for his benefit, but a creditor cannot apply to the Court to be paid out of it, and when the lunatic dies the power of the Court ceases, because the necessity for it ceases. The principle is shewn in *Re Upfull's Trusts* (2).

Even if a debt exists, the Court will not deal with it in the matter, but will leave the creditor to make his demand against the legal personal representative in the ordinary way.

Swanston, in reply, referred to Vane v. Vane (3).

JAMES, L.J.:—

I am of opinion that, with the exception of the trifling amount

(1) Law Rep. 9 Ch. 85.

(2) 3 Mac. & G. 281.

(3) 2 Ch. D. 124.

which had become payable but was not received under the order of July, 1856, before *Moore* was removed, the order of the Vice-Chancellor is right. Counsel for the Appellants have rested their case partly on the order, partly on a *quantum meruit*. But a case cannot be pieced together in this way. The Appellants cannot establish a right under the order, for the order was to pay £31 4s. which the Court considered a proper sum to be allowed for the maintenance of the lunatic in a particular asylum; and the order came to an end when he was removed, just as it would have come to an end if he had recovered, or if a friend had taken him to his house. The guardians did not take any steps to get a new order applicable to the altered circumstances of the case, and were guilty of just the same kind of laches as if they had never sought for any order at all. We cannot make any such order, because it was not applied for while the Court had jurisdiction to make it. At the death of the lunatic the money belongs absolutely to his legal personal representative, who will be liable to pay what is legally due for the lunatic's maintenance, just as he is liable to pay any other of the lunatic's debts. The demand of the guardians must be recovered like any other debt, in a due course of administration. It is no charge on the assets, and we cannot make it a charge merely because the guardians might in due time, if an application had been made, have obtained a charge.

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The question is, whether the Vice-Chancellor was right in directing payment to the lunatic's legal personal representative of a sum to which the lunatic was absolutely entitled. How is the right of the representative interfered with? It is said that under an order of the 25th of July, 1856, certain sums were payable out of the fund to the Appellants. I should be sorry to decide on a mere technicality, but this order was made with reference to the maintenance of the lunatic, and it was ordered that he should remain at a particular asylum, the yearly expense of his maintenance at which was £31 4s., and that £31 4s. should be allowed for his maintenance. As a matter of construction that must be taken to mean for his maintenance while residing there. It was not intended by this order to recoup the guardians gene-

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rally for his maintenance, but to allow what they should expend upon him at this particular asylum. We cannot give maintenance at another asylum now, on the ground that the Court, if asked at the time of the lunatic's removal, would have done so. It probably would have done so, but as things now stand, how are we to interfere with the right of the administrator? The lunatic is dead, and we are not now asked to deal with the fund for his benefit, on the ground that he, though living, is unable to deal with it himself. We are asked to interfere with the right of his personal representative, who is capable of dealing with it, and I know of no case in which the Court after the death of a lunatic has interfered with the rights of his personal representative by paying debts or otherwise. In my opinion we have no jurisdiction to make such an order as is asked.

Thesiger, L.J. THESIGER, L.J. :—

I am of the same opinion. I think that the order was conditional on the residence of the lunatic at a particular asylum, and came to an end when he was removed. We are then asked to take an equitable view, and make a retrospective order. I am of opinion that the Court has no jurisdiction to do so, and that payment of what is due to the guardians can only be claimed from the administrator in a due course of administration.

Solicitors: *Rogerson & Ford ; Clarke & Calkin.*

WEATHERALL v. THORNBURGH.

[1875 W. 23a.]

*Will—Construction—Accumulations—Thellusson Act (39 & 40 Geo. 3, c. 98)—
Charge of Annuity and Legacies—Residue payable at a future Time—
Acceleration of Interest—Intestacy.*

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March 9, 11.

A testator, who died in 1852, gave freehold and leasehold estates to trustees upon trust for his wife for life or second marriage, and in case she should marry again, then from and after that event, during the remainder of her life, in trust to receive the rents and to hold the same during her life upon the trusts thereafter mentioned, and after her death to the use of *G.* absolutely. He then gave his personal estate to the same trustees, and directed them to pay the income to his wife during her widowhood, but if she should marry again, then from and after such marriage all these bequests in her favour were to cease, and in lieu thereof they were to pay her, out of the rents and income, an annuity of £500, and, during her life, to invest the surplus (if any); and after her decease such trust moneys, surplus, rents, funds, and accumulations of income were to be disposed of by the trustees in paying certain legacies; and the residue he gave to *T. M.* absolutely. The widow married again in 1854. Her annuity had been paid, as well as the debts and legacies, and since her marriage the residue of the rents and income had been invested and accumulated:—

Held (affirming the decision of *Hall*, V.C.), that as to the surplus rents and income which would accrue between the expiration of twenty-one years from the testator's death and the death of his widow, there was an intestacy; and that *T. M.* was not entitled during the life of the widow to ask for payment of the accumulated funds, subject to provision being made for payment of the annuity and legacies.

THOMAS HURD, who died on the 16th of April, 1852, by his will, dated the 14th of that month, after giving a legacy and certain specific bequests to his wife, and bequeathing a leasehold messuage to two trustees, whom he appointed executors, upon trust for his wife during her life or widowhood, and after her decease or marriage to *Thomas Messiter*, absolutely, gave his freehold and leasehold hereditaments unto the same trustees, their heirs, executors, administrators, and assigns respectively, upon trust for his wife during her life or until her second marriage; and in case she should marry again (which event happened), then from and after her second marriage, during the remainder of her life, in trust to receive the rents and profits of his real and leasehold

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hereditaments, and to hold the same during the then residue of the life of his wife upon the trusts thereafter mentioned; and from and immediately after the death of his wife, then as to all his last-mentioned real and leasehold estates to the use of *George Messiter*, his heirs, executors, administrators, and assigns, absolutely; and as to all other his personal estate, he gave the same to the same trustees upon trust for sale and conversion, with the consent of his wife, and out of the same to pay all his debts, funeral and testamentary expenses, and legacies; and as to all the residue of his personal estate, upon trust, with the consent of his wife, to invest the same and to pay the annual produce to his wife during her widowhood, but if she should marry again, then from and after such marriage he directed that all the bequests in her favour (except the pecuniary and specific bequests first above mentioned) should cease, and that in lieu thereof the trustees should, out of the rents and profits of the freehold and leasehold hereditaments, and out of the income of the residuary estate, pay his wife an annuity of £500 half yearly for her sole use; and he directed the trustees, during the life of his wife, to invest in their names the surplus (if any) which, after satisfying the annuity, should remain in their hands of the said rents and profits of the hereditaments, and the income of the stocks, funds, and securities of his residuary estate; and from and after her decease he directed that the said trust moneys, surplus rents (if any), stocks, funds, and securities, and the accumulations of interest thereon (if any), should be disposed of by the trustees in paying divers legacies to persons and charities, several of such legacies being contingent on the legatees surviving the testator's wife, and in holding a sum of £4000 for such persons and upon such trusts as his wife should by will appoint; and with respect to the residue of the said trust moneys, surplus rents (if any), stocks, funds, and securities, after answering the purposes before mentioned, he gave and bequeathed the same to *Thomas Messiter*, his executors, administrators, and assigns, absolutely.

The testator's widow, in October, 1854, married the Defendant, *Francis Thornburgh*.

Thomas Messiter died in December, 1874.

The executors and trustees paid the testator's debts, funeral and

testamentary expenses, and such of the legacies as became payable immediately, and invested the residue of the personal estate. After the second marriage of the testator's widow the trustees paid her the annuity of £500 bequeathed to her out of the rents and profits of the real and leasehold estates, and out of the income of the residuary personal estate, and accumulated and invested the surplus income.

The capital of the residuary personal estate consisted of the sum of £26,584 11s. 10d. Reduced Annuities standing in the names of the trustees; and the fund which had arisen from investment and accumulation of the surplus income of the real and residuary personal estates, consisting of £11,954 2s. 8d. Three per Cent. Consols, was also standing in their names; and they had a sum of £421 3s. 10d. cash. The legacies payable at the death of the testator's widow amounted to £24,520. Questions having arisen as to who were entitled to such parts of the accumulated fund as had arisen since the 16th of April, 1873, the expiration of twenty-one years from the death of the testator, and also to the future surplus rents and income of the estates which should accrue during the life of the widow, an action was commenced by the surviving trustee to have the trusts of the will carried into execution. The Chief Clerk made his certificate certifying that the testator was illegitimate, and that he never had any issue.

The action was tried before Vice-Chancellor *Hall* on the 29th of May, 1877.

W. Pearson, Q.C., and *Hamilton Humphreys*, for the Plaintiff.

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Dickinson, Q.C., and *Henderson*, for the Defendants, *F. Thornburgh* and his wife, the widow of the testator, claimed half the surplus income of the personal estate between the expiration of twenty-one years from the death of the testator and the death of the widow, during which period the accumulation was made void by the *Thellusson Act* (39 & 40 Geo. 3, c. 98).

Rigby, for the Attorney-General, claimed on behalf of the Crown the surplus rents of the real estate and half the surplus income of the personal estate during the same period.

Argument.

Hemming, Q.C., and *Chisholm Batten*, for the personal repre-

C. A. representative of *T. Messiter*, contended that *T. Messiter*, being absolutely entitled to the trust fund subject to the payment of the annuity and the legacies, was entitled to stop the accumulation as soon as a sufficient sum had been accumulated to provide for the annuity and the legacies, and to receive the surplus immediately. His representative was therefore entitled to the intermediate income, both of the real and personal property. They cited *Saunders v. Vautier* (1), *Josselyn v. Josselyn* (2), and *Harbin v. Masterman* (3).

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HALL, V.C.:—

In my opinion the views expressed by Vice-Chancellor *Wickens* in the case of *Harbin v. Masterman* do not apply to this case; at any rate, that case does not govern the present. The testator has not merely directed that an annuity shall be paid to his widow for life, but he has said that there shall be no division of the fund until after her death. He had a perfect right to do what his language shews he did, and he did that not merely for the purpose of postponing the enjoyment of the surplus by the residuary legatee, but for the purpose of making an accumulation to provide a fund for the payment of certain legacies which he bequeathed out of the accumulations. The Court having regard to the other trusts would not, irrespective of the *Thellusson Act*, set aside a fund in this case, and hand over the residue to the residuary legatee. But if the Court would have done that, it would have been, not because of the will of the testator, but because it saw a mode of effectuating, without interfering with any rights, the object and purpose of the testator. To do that would be a departure from the declared intention; but the Court would do that only when it could do it safely, and without interfering with any rights. This case, however, does not rest there, for the question has been considered by Vice-Chancellor *Bacon* in the case of *Talbot v. Jevers* (4), where there was a gift of realty and personalty to a trustee, a bequest of annuities, and a direction, subject to the payment of them out of rents and income, to accumulate the sur-

(1) 4 Beav. 115; Cr. & Ph. 240.

(2) 9 Sim. 63.

(3) Law Rep. 12 Eq. 559.

(4) Ibid. 20 Eq. 255.

plus until the decease of the last surviving annuitant, "or during such portion of such surviving annuitant's life as the rules of law will permit," and on the decease of that person the trust funds and accumulations were to be applied by the Court in the purchase of land for the benefit of the person mentioned in the will, and the Vice-Chancellor *Bacon* held that as to the fund which would accrue during the period which would elapse after the expiration of twenty-one years from the testator's death, and the death of the surviving annuitant, there was an intestacy; and he declined to give the fund, after providing for the annuities, to the person entitled in reversion during the life of the surviving annuitant. That case is undistinguishable from the present, and therefore I shall follow it.

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The minutes were as follows:—

Declare, that as between the persons entitled to the residuary real and personal estate, the annuity given by the will to the widow is payable rateably out of the income of the real and personal estate;

That the trusts for accumulation directed by the will, of the surplus income of the testator's residuary real and personal estate, ceased upon the 16th of April, 1873, being the expiration of twenty-one years from the testator's death; and,

That the surplus income of the testator's residuary real and personal estate from the 16th of April, 1873, down to the decease of the widow, are not effectually disposed of by his will, and that the Defendant, the widow, is entitled to one equal moiety of such part of the surplus income so undisposed of, as has arisen or shall arise from personal estate; and that the Crown is entitled to the other moiety of such surplus of the personal estate, and the entirety of the surplus income as has arisen, or shall arise, from the rents, &c., of the real estate; and let the costs be paid out of the fund (£26,584) in Court.

From this decision the personal representative of *Thomas Messiter* appealed. The appeal came on to be heard on the 9th of March, 1878.

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Hemming, Q.C., and *Chisholm Batten*, for the Appellant:—

Argument.

The *Thellusson Act* has no effect on the fund in this case. There was an absolute gift to *Thomas Messiter* of everything that would not be required for the payment of the annuity and the legacies. Therefore, when sufficient had been accumulated to provide for these charges, which happened long before the twenty-one years limited by the Act expired, *Thomas Messiter* had a right to come to the Court and claim to have the surplus paid to him. The case

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is governed by *Saunders v. Vautier* (1) and *Josselyn v. Josselyn* (2). If there had been no annuity or other charges payable out of the fund, there would have been no question as to the absolute right of the legatee of the fund to stop the accumulations: what difference can it make in his right that these are charges on the fund, if there is sufficient to pay them off?

[JAMES, L.J.:—The fund may turn out, from unforeseen circumstances, to be deficient.]

The Court will not regard so remote a contingency. If the fund were a million of money, and a legacy of £10 payable out of it at a fixed date, would the Court allow the fund to go on accumulating till that date? *Gosling v. Gosling* (3); *Coventry v. Coventry* (4).

But if the Court should be of opinion that the fund cannot be distributed till the death of the widow, although the accumulations must stop at the end of twenty-one years, we contend that the surplus income is given to the Appellant by the *Thellusson Act*. The words of the Act are, that “the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.” Here, “the residue of the trust-money, surplus rents (if any), stocks, funds, and securities, after answering the purposes aforesaid,” are given at the death of the testator’s wife to *T. Messiter*. With regard to the personal property, at all events, this passes the intermediate income to *T. Messiter*, though it may be different with respect to the intermediate rents of the real estate: *Hodgson v. Earl Bective* (5); *In re Clulow’s Trust* (6); *Ellis v. Maxwell* (7).

Rigby, for the Attorney-General:—

When the Court stops the accumulations at the request of the person entitled to the fund, it is not done as a matter of right, but

(1) 4 Beav. 115; Cr. & Ph. 240.

(2) 9 Sim. 63.

(3) Joh. 265.

(4) 2 Dr. & Sm. 470.

(5) 1 H. & M. 376; 10 H. L. C. 656.

(6) 1 J. & H. 639.

(7) 3 Beav. 587; 12 Beav. 104.

of indulgence to the claimant, because by the accumulation he is injured and no one is benefited. But if the rights of any one else may by possibility be affected, the Court will not interfere. It has never been done where there is a charge on the fund, though it might perhaps be done if the charge were of such a nature that it could be paid off at once; but here that cannot be done, for the legacies are not to be paid till the death of the widow. There is nothing, therefore, to prevent the *Thellusson Act* from taking effect in this case, and if it does, the intermediate income both of real and personal estate must go as in an intestacy. There is no gift of it to *T. Messiter*. It is a lapsed portion of a residue, and therefore cannot go to the residuary legatee: *Harbin v. Masterman* (1); *Eyre v. Marsden* (2); *Oddie v. Brown* (3); *Jarman on Wills* (4).

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Dickinson, Q.C., and *Henderson*, for the widow of the testator:—

We claim half the intermediate income of the present estate on the same grounds as the Attorney-General claims the other half. What the testator was dealing with was residue, and he was providing for its distribution at the death of his widow. He directed that it should not be divided till that time; indeed, it is impossible that it should be, for some of the legacies are contingent, and the legatees cannot be determined till that event happens. Therefore the gift of the surplus was a gift entitling the donee to call for payment of it during the widow's life. Suppose the gift had been to accumulate the income till the death of his widow, and then to pay £1000 to each of the grandchildren of *A.* then living, and the surplus to *B.*, how could *B.* claim the fund, whatever the amount might be, before the event happened? In the present case, although the amount payable is not contingent, the persons to receive it are: *Green v. Gascoyne* (5); *Wildes v. Davies* (6); *Theobald on Wills* (7). The *Thellusson Act* has never been allowed to accelerate the interest of the persons entitled to the fund subject to the accumulations.

(1) Law Rep. 12 Eq. 559.

(2) 2 Keen, 564.

(3) 4 De G. & J. 179.

(4) 3rd Ed. vol. i. p. 292.

(5) 4 D. J. & S. 565.

(6) 1 Sm. & Giff. 475.

(7) Page 308.

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Hamilton Humphreys, for the Plaintiff.

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Hemming, in reply :—

The *Thellusson Act* by its very terms was intended to prevent accumulations where but for that Act they would have extended beyond twenty-one years, and not to alter the rights where without that Act the accumulations would have been stopped by the ordinary action of the Court. This was the view of Vice-Chancellor *Wickens* in *Harbin v. Masterman* (1), and it is founded on sound principles of construction of statutes. No doubt *Talbot v. Jevers* (2) would be against us, if there had been a residuary gift in that case. But the Vice-Chancellor held there was not; and if he had not so read the will, his decision would have been, as we submit, erroneous in principle.

Judgment, C. A. JAMES, L.J. :—

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I am of opinion that the decision of the Vice-Chancellor must be affirmed. The will must be considered independently of the *Thellusson Act*, and then the *Thellusson Act* must be applied to the state of things so determined. The *Thellusson Act* says that “where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.” The first question, therefore, is—If, independently of the *Thellusson Act*, the accumulations had only lasted for twenty-one years, to whom would the income after the expiration of twenty-one years have gone? This must be decided in the same way as if the testator had said in a codicil, “Since the making of my will I have been reminded that my wife may live more than twenty-one years after my death. I therefore direct that the accumulation which I have divided by my will shall stop at the end of twenty-one years.” What would have been the result of such a direction? The effect would have been that after

(1) Law Rep. 12 Eq. 559.

(2) Law Rep. 20 Eq. 255.

twenty-one years there would have been a gap. He directs that the capital and the accumulations shall not be divided till the death of his wife, so that if he made no distribution of the surplus income of the twenty-one years, and his wife was still alive, there would have been a gap as to the intermediate income till the death of his wife. Who, then, would be entitled to that income? I am of opinion that *Thomas Messiter* is not the residuary legatee under the will; he is only residuary *cestui que trust* in remainder after the death of the wife of the particular fund, and there is nothing in the *Thellusson Act* to give the accumulations to him. There is no gift of the surplus income to any person whatever until the death of the wife. The testator has divided the enjoyment of his property into two parts, something to be enjoyed before and something to be enjoyed after the death of his wife. Accumulations which fail under the *Thellusson Act* must be treated in the same way as a gift which fails under the *Mortmain Act*. It has never been held that property that is set free by the operation of the *Mortmain Act* will accrue for the benefit of the persons entitled in remainder. It is the same as if the testator had only directed accumulation for twenty-one years, and had said nothing as to the income after that time till the death of his wife.

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James, L.J.

In *Saunders v. Vautier* (1) the bequest was quite different. There was an absolute gift to begin with, and then a direction to accumulate the income, and the legatee attained twenty-five, and the Court acted on the established principle that where there is an absolute gift to an adult male, any direction to restrain his enjoyment of it is absolutely idle, unless there is a defeasance. In such a case a direction to accumulate the income is only a mode of preventing the person entitled from enjoying the property, which can have no effect.

It was said that this case is within the principle of *Hodgson v. Earl Bective* (2), which decided that where there is a gift of personal property to a man at a future time, it carries the intermediate income. But that is because in such a case there is a clear indication of the testator's wish that the legatee should have the income; it goes, by way of accretion, to the person absolutely

(1) 4 Beav. 115; Cr. & Ph. 240.

(2) 10 H. L. C. 656.

C. A. entitled to the capital. That does not apply to a case where the
 1878 testator has said what is to be done with the income till the par-
 WEATHERALL ticular period arrives. The order of the Vice-Chancellor must be
 v. affirmed.
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Judgment, C. A.
 Cotton, L.J. COTTON, L.J. :—

The first question is this: As soon as a sufficient sum has been accumulated to meet the charges on the fund, has the person ultimately entitled to the residue of the fund a right to come to the Court and claim to have the residue of the fund paid at once to him? This is not like the case of *Saunders v. Vautier* (1). That case simply decided that if property is given to a person of full age any restriction on his enjoyment of it is inconsistent with his absolute interest. But here it is conceded that until the accumulated fund had become sufficient to pay the legacies the direction to accumulate was for an object which was legal, and which ought to have effect given to it. Then it happens in this case that the legacies cannot be paid till the death of the widow; therefore it is not like dealing with a case where there are no legacies charged on the fund. That being so, can the Appellant say that he is entitled to the residue of the fund as soon as there is sufficient to pay the legacies? He cannot be entitled of right, because if from any accident to the investment it should become insufficient, the legatees would have a claim upon him. Perhaps the Court, having due regard to the security of the legacies, would, if it thought there was no reasonable probability of any loss occurring, pay out the residue to the person entitled. But it is a matter of indulgence and discretion in the Court. A trustee could not without risk pay over the fund: if he did, he would be liable in case the fund proved insufficient. It would be otherwise if it was a matter of right. All that can be said is, that it is in the discretion of the Court whether, under peculiar circumstances, it shall keep the person entitled to the residue of the fund any longer out of the enjoyment of his property; but of right he cannot claim it.

Therefore I am of opinion that in this case the Appellant could

(1) 4 Beav. 115; Cr. & Ph. 240.

not have come when the fund was sufficient for payment of the legacies and stop the accumulations by claiming the residue of the fund.

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Then comes the question of the effect of the *Thellusson Act*. Is the Appellant "the person who would have been entitled to the surplus income if the accumulation had not been directed?" It is argued that he is the residuary legatee under the will and therefore that he would have been entitled to the income if the accumulation had not been directed, and *Ellis v. Maxwell* (1) was referred to. But that case was very different from the present. There the testator made his wife by a separate clause his residuary legatee of anything which he might not have disposed of. Of course that would carry the property comprised in every gift which failed for illegality. Here the Appellant is not appointed residuary legatee by an independent clause, he is only a legatee in remainder of the accumulated fund, and there is a gap between the expiration of the period of twenty-one years and the time when he will become entitled to it. The testator gave him the accumulated fund as the legatee of that fund and not as residuary legatee. During the lifetime of the widow he could claim nothing; he was only legatee in remainder after the death of the widow of a fund already constituted.

THESIGER, L.J.:—

Thesiger, L.J.

I also agree that the decision of the Vice-Chancellor must be affirmed. The principle on which the Court construes a bequest of accumulations which has become void under the *Thellusson Act* is laid down in *Eyre v. Marsden*. The Master of the Rolls there says (2): "The statute, as it appears to me, was not intended to operate, and does not operate, to alter any disposition made by the testator, except his direction to accumulate. Striking that out, everything else is left as before, and all the other directions of the will as to the time of payment, substitution, or any contingencies, are to take effect according to the true construction of the will, unaltered by the effect of the statute." Following out this principle, it was held in *Green v. Gascoyne* (3), that the effect of the

(1) 3 Beav. 587; 12 Beav. 104.

(2) 2 Keen, 574.

(3) 4 D. J. & S. 565.

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statute is not to accelerate the enjoyment of any interest under the will. Therefore the only question is whether the Appellant has such an absolute interest as would entitle him to stop the accumulation as in *Saunders v. Vautier* (1). If this be the true question, the decision in *Talbot v. Jevers* (2) is in point. In that case the testator by the words of his will created a gap between the period when the accumulation was to cease and the death of the surviving annuitant, and the Court held that there was an intestacy with respect to the intermediate income, and refused to stop the accumulations and to pay the fund, subject to provision for the annuities, to the person ultimately entitled to the fund. In the present case the gap is caused by the statute, and it appears to me that the statute places it on the same footing as if it had been directed by the will. It was not denied that, but for the distinction to which I have referred, *Talbot v. Jevers* and the present case are undistinguishable. I will only add that the will does not constitute the Appellant residuary legatee, but a legatee of a particular fund after the death of the widow, and therefore his interest is one which does not take effect until after her death.

With respect to the surplus rents of the real estate the Appellant's claim for them has been abandoned.

Solicitors: *W. J. Moon; Hare & Fell; J. Watson*, agent for *J. R. Bramble, Bristol; Wedlake & Letts*, agents for *H. B. Batten, Yeovil*.

(1) 4 Beav. 115; Cr. & Ph. 240. (2) Law Rep. 20 Eq. 255.

In re PINTO SILVER MINING COMPANY.

Company—Voluntary Winding-up—Dissolution—Companies Act, 1862, s. 143
—Acquiescence.

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July 20;

Aug. 1.

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March 11, 12.

The *P. Company* granted a mortgage of all its mining property to two trustees upon trust to secure, *pari passu*, the sums advanced by various lenders, of whom *K.* was one. Some time afterwards, it being thought desirable to reconstitute the company, resolutions were passed for a voluntary winding-up, and the liquidators agreed for the sale of the assets to the *B. Company*, which was formed for the purpose. The price was to be paid partly in bonds and partly in shares of the *B. Company*. A meeting of the mortgage creditors was held, at which the sale was unanimously approved of. *K.* was not present at this meeting, but there was evidence that he knew of and acquiesced in all that was done under the winding-up. The sale was completed and the property conveyed to the *B. Company* by a deed in which the mortgagees and their trustees did not join. Most of the mortgagees accepted debentures of the *B. Company* in satisfaction of their claims; but *K.* did not. The liquidators made their financial report, and called a meeting to consider it, pursuant to sects. 142, 143 of the *Companies Act, 1862*, and the return was registered. About three years after this *K.* presented a petition to wind up the *P. Company*:—

Held, by *Hall, V.C.*, that the company could not be deemed to have been dissolved as against the Petitioner and other unsatisfied creditors; and that an order for winding it up ought to be made:

Held, on appeal, that as the Petitioner had all along known of and acquiesced in the winding-up proceedings, he could not now treat the dissolution as invalid:

And, *semble*, that there is no jurisdiction to wind up a company which has been dissolved under the *Companies Act, 1862, s. 143*, unless the dissolution can be impeached on the ground of fraud.

THIS was a petition by *Thomas Key*, a creditor, for the compulsory winding-up of the *Pinto Silver Mining Company, Limited*.

The company was incorporated in 1871, with a capital of £130,000, in 26,000 shares of £5 each. Its objects were stated in the memorandum of association as being (*inter alia*) to purchase certain lands or interests in lands in *Nevada* or elsewhere for the purpose of mining operations.

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By the 66th clause of the articles of association it was provided that the directors should be at liberty to raise by loans upon mortgage of the lands, property, and works and effects of the company, or by promissory notes, bills of exchange, and other transferable securities, and otherwise, as they should think fit, such sums of money as they should from time to time require for carrying on or extending the works, or for any objects of the company.

In 1872 the company determined to raise a sum of money by mortgage bonds, the repayment of which was to be secured by a general mortgage of the company's property in *Nevada*. For this purpose two deeds of the 16th of July, 1872, were executed, by the first of which the company conveyed its mines and mining rights, property, and assets in *Nevada* unto and to the use of *Gosset* and *Cresswell*, their heirs, executors, administrators, and assigns, upon trust to sell and to hold the proceeds upon the trusts declared by the other deed of the same date. By the second deed made between the same parties it was declared that the trust for sale should not be exercised unless the trustees or trustee should be authorized in writing to sell by not less than five of the persons who should advance money on the bonds, and who should be entitled in the aggregate to not less than one-half of the whole sum advanced to the company. And it was declared that the trustees should hold the property until sold, and after sale, the proceeds of such sale, upon trust to secure the repayment to the persons advancing money on the mortgage bonds in proportion to the moneys advanced by them, without any preference or priority, the whole of the principal moneys advanced by them with simple interest at £20 per cent. per annum from the periods of the respective advances, the interest, in the case of deficiency, being the first charge.

The Petitioner *Key* advanced to the company £1000, in respect of which he was entitled to the benefit of the trust created by the above deeds; and various other persons made advances on similar security. It did not appear that any mortgage bonds were in fact issued to them.

On the 22nd of January, 1873, the following resolutions were passed at a meeting of shareholders: 1. That the company



should be wound up by voluntary liquidation. 2. That *S. H. Loutit* and *M. Dyett* should be appointed liquidators. 3. That the liquidators should be authorized and instructed to sell for shares the company's mill, furnaces, mines, and premises, subject to the existing mortgage debt and other liabilities of the company. These resolutions were confirmed at a meeting held on the 12th of February, 1873.

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The liquidators came to an arrangement to sell the property of the company to the *Basye Consolidated Silver Mining Company*, a company which was formed for the purpose, and in which the shareholders were, with hardly any exceptions, the same persons as those of the *Pinto Company*. The terms were embodied in an agreement dated the 26th of March, 1873, made between the liquidators of the one part, and the *Basye Company* of the other part, and duly registered as required by 30 & 31 Vict. c. 131, s. 25. By this agreement the liquidators agreed to sell, and the *Basye Company* to purchase, all the property of the *Pinto Company* in *Nevada* for £91,000, of which £9000 was to be paid in debenture bonds of the *Basye Company*, £19,000 in fully paid-up £5 shares in that company, and £63,000 in £5 shares in that company, on which £4 10s. per share was to be taken as paid, leaving a liability of 10s. on each share. Clause 7 of the agreement provided: "That in case any of the shareholders, mortgagees, or creditors of the said *Pinto Silver Mining Company, Limited*, shall neglect or refuse to accept his or their allotment in debenture bonds, or fully paid-up shares, or shares with a liability of 10s. thereon in the said purchasers' company, the said liquidators shall transfer their interest in such proportion or allotment of debenture bonds or shares back again to the said purchasers' company, without incurring any liability or responsibility in respect to any such debenture bonds or shares." Clause 8. "The said vendors shall make a perfect and complete title to the said mines and premises." Clause 9. "That immediately the agent of the said purchasers shall certify that the title is good by telegraphic message or otherwise the said purchasers shall complete the purchase and deliver over the said debenture bonds and certificates of fully paid shares and shares with £4 10s. paid to the said vendors, and the said vendors

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shall thereupon put the purchasers in possession of the said mines, mining properties, mills, and premises." Clause 14. "That inasmuch as the said vendors are liquidators of the said *Pinto Silver Mining Company, Limited*, and it is the true intent and meaning of them and the said purchasers that the said purchasers should take over all the property and discharge all the debts and liabilities of the said *Pinto Silver Mining Company, Limited*, and that the said purchase-money in debentures and shares should include and be sufficient to discharge all such debts and liabilities, and pay them either in debentures or shares as aforesaid, it is hereby expressly further agreed and declared that the said purchasers shall pay and discharge any further debts or liabilities of the said *Pinto Mining Company, Limited*, should any be discovered after the day of the signing of this agreement, and generally any debts and liabilities which are not provided for by the agreement, and indemnify the said vendors therefrom."

A meeting of the mortgagees was called to consider the above arrangement, and was held on the 14th of July, 1873. It was attended by more than three-fourths in number and value of the mortgagees, and a unanimous resolution was passed approving of the agreement. *Key*, it appeared, was not present. *Cresswell*, one of the trustees for the mortgagees, who was also chairman of the company, deposed that substantially the mortgagees were the only creditors of the company. The sale was completed by a conveyance from the *Pinto Company* to the *Basye Company*, not mentioning the mortgage which remained vested in *Gossett and Cresswell*, and of which the *Basye Company* had full notice.

The liquidators stated the result of the winding-up in the following report, dated the 6th of January, 1874:—

"In accordance with the following resolutions passed at the meeting of shareholders held on the 22nd day of January, 1873, and confirmed by a subsequent meeting on the 12th day of February, 1873,—

1. That the *Pinto Silver Mining Company, Limited*, be wound up by voluntary liquidation;
2. That Messrs. *Samuel Henry Louttit* and *Mark Dyett* be appointed liquidators thereof;

3. That the liquidators be authorized and instructed to sell for shares the company's mill, furnaces, mines, and premises, subject to the existing mortgage debt and other liabilities of the company,

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we proceeded to dispose of the property of the company to the *Basye Consolidated Silver Mining Company, Limited*. A copy of the agreement made by us with this object is set forth in the articles of association of the *Basye Consolidated Silver Mining Company, Limited*, now laid before the meeting.

"We also offered to the shareholders of the *Pinto Silver Mining Company, Limited*, another opportunity of declaring their option to take fully paid shares in the *Basye Company* equal to one in ten of their holding in the *Pinto Company*, or to accept shares with £4 10s. paid and a further liability of 10s. per share for the same amount as they held in the *Pinto Company* in exchange as their portion of the purchase-money.

"With very few exceptions all have elected to take one option or the other.

"The account now submitted is the final account of the liquidation, and shews the disposal of the shares and debentures received from the purchasers of the property.

"The balance of the shares standing in our names in the *Pinto Company* have been handed by us to the *Basye Consolidated Silver Mining Company, Limited*, in accordance with the conditions of the agreement entered into with them.

"A small cash balance of £9 has also been handed over to the *Basye Company*.

"In giving you the final report of our labours we take the opportunity of congratulating you on the improved position you now hold as shareholders in the *Basye Company*, which we understand from the directors promises to realize all the hopes once formed of the *Pinto Company*."

Key did not declare any option, and never received either shares or debentures in the *Basye Company*.

The final account rendered by the liquidators and sent with the above report was as follows:—

A meeting was called for the 6th of January, 1874, for the purpose of having the final account of the liquidators laid before it, and was convened and advertised in manner required by the *Companies Act*, 1862, s. 142. A return of this meeting was duly made on the 12th of January, 1874, as required by sect. 143, and was registered.

In December, 1876, *Key* presented a petition for winding up the *Pinto Company*. This petition, after shortly stating the Petitioner's title as a creditor in respect of the £1000 and the resolutions for voluntary winding up, proceeded as follows:—

“10. Nothing has been done under the voluntary winding-up to or towards liquidation of its affairs or payment of its creditors. 11. Your Petitioner believes that if the assets of the company were realized there would be sufficient funds applicable to the payment of his claim to satisfy it, or nearly so. 12. Under present circumstances the company cannot pay its debts. 13. The company has not done any business for a year prior to the presentation of this petition. 14. It is just and equitable that the company should be wound up by this Honourable Court.” The Petitioner prayed a compulsory winding-up.

Evidence was given on the part of the liquidators, *Louitt & Dyett*, that *Key*, though he did not attend the meeting of mortgagees, was fully aware of the proceedings under the winding-up, and assented to them.

The petition came on for hearing before Vice-Chancellor *Hall* on the 20th of July, 1877.

Karslake, Q.C., and *Latham* for the Petitioner, referred to the *Companies Act*, 1862, ss. 142, 143, 145, 146, and *In re Crookhaven Mining Company* (1). They urged that the affairs of the company were not fully wound up, as its debts had not been paid.

Dickinson, Q.C., and *Beale* for the liquidators of the *Basye Company*, supported the petition.

W. Pearson, Q.C., and *Pugh*, for *Louitt* and *Dyett* opposed:—

The affairs of the company were fully wound up, and under

(1) Law Rep. 3 Eq. 69.

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C. A. sect. 143 the company no longer exists. *Carr's Case* (1). The
 1878 petition ought to be dismissed: *In re Haytor Granite Company* (2).

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Ingle Joyce, for shareholders.

Karslake, in reply.

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Aug. 1. HALL, V.C., after stating the facts, continued :—

The petition to wind up is opposed, it being contended that the Petitioner, if ever a creditor, became a creditor of the *Basye Company*, there being a novation. It appears to me that this is not made out. The Petitioner had not personally been in direct communication with the *Basye Company*, and never had issued to him the bonds in that company.

It was said that although the Petitioner was not present at the meeting of the mortgagees, he was made acquainted with what had taken place, and after the meeting approved of what had been done thereat; but, assuming this to be so, each of the mortgage creditors was, under the agreement with the *Basye Company*, to have the option of taking the debenture bonds of that company, and under the circumstances of this case I consider that the Petitioner, within the meaning of the 7th clause of the agreement with the *Basye Company*, neglected to accept his proportion of the debenture bonds, and therefore remained a creditor of the *Pinto Company*.

I have assumed that the resolutions authorizing the sale to the *Basye Company* were valid as against the Petitioner by reason of the meeting of the mortgagees, which, however, I do not state to be the case, the meeting being a meeting of mortgagees only, and not of creditors of the company generally, as required by the *Companies Act*, 1862, s. 162. Moreover, the agreement for sale to the *Basye Company* did not conform to the resolutions of the 22nd of January, and the 12th of February, 1873, inasmuch as it did not provide for the sale being subject to the existing mortgage debt and the other liabilities of the company, and the conveyance was framed as an ordinary conveyance, free from incumbrances. This was a clear breach of trust on the part of the trustees for the

(1) 33 Beav. 542.

(2) Law Rep. 1 Ch. 77, 80.

mortgage creditors. The Petitioner in his last affidavit states that he was not aware of this departure from the resolutions till shortly previous to the filing of his petition. Under such circumstances, the Petitioner retained his rights as a creditor of the *Pinto Company*.

It was further contended that the petition was not sustainable by reason of the *Pinto Company* having been, as it was said, dissolved. The dissolution, it was said, was effected thus:—The liquidators of the *Pinto Company*, on the 6th of January, 1874, reported to the shareholders the sale which had been made to the *Basye Company*, and with that report was an account which the report stated to be the final account of the liquidation, and which shewed the disposal of the shares and debentures received from the purchasers of the property. It further stated in effect that, with few exceptions, the shareholders had taken shares in the *Basye Company*, and it then stated as follows:—"The account now submitted is the final account of the liquidation, and shews the disposal of the shares and debentures received from the purchasers of the property. The balances of the shares standing in our names in the *Pinto Company* have been handed by us to the *Basye Consolidated Silver Mining Company, Limited*, in accordance with the conditions of the agreement entered into with them. A small cash balance of £9 has also been handed over to the *Basye Company*. In giving you the final report of our labours, we take the opportunity of congratulating you on the improved position you now hold as shareholders in the *Basye Company*, which, we understand from the directors, promises to realize all the hopes once formed of the *Pinto Company*." It will be observed that this report does not deal with the mortgagees of the *Pinto Company*. In the account which accompanied the report, the debtors' side contains in debenture bonds bearing 15 per cent. interest, £9000, and the creditors' side contains—"By a portion of the debenture bonds of the *Basye Consolidated Silver Mining Company*, as per agreement, dated 26 March, 1873, for the mortgagees of the *Pinto Mill* and sundry other creditors, £9000." Such of the mortgagees in the *Pinto Company* as did not accept the debenture bonds of the *Basye Company*, amongst whom was the Petitioner, are thus not dealt with, except that apparently from the account, although this

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is not made clear, the liquidators have thought fit to treat the bonds of the *Basye Company* as substantially the bonds of the *Pinto Company*, though the liquidators cannot prove, at least against the Petitioner, any express or other authority so to do, and I am of opinion that the report and accounts in no way affected the mortgage creditors in the *Pinto Company* who had not bonds in the *Basye Company* sent to them.

The report and account having been then sent to the *Pinto Company*, the liquidators' next step was to make to the Registrar a return of the meeting. This was made on the 12th of January, 1874, and it is contended that, this having been done, the *Pinto Company*, on the 12th of April following, became dissolved by virtue of the *Companies Act*, 1862, ss. 142, 143.

It appears to me that this company cannot be deemed dissolved, at least as regards the Petitioner and the other unsatisfied creditors of the company. The 142nd section is only capable of being acted upon as soon as the affairs of the company are fully wound up. Such was not the case when the meeting in question was held and the return made. The case of *In re Crookhaven Mining Company* (1) supports the view which I take. There must be the usual order for winding up.

C. A. The liquidators appealed. The appeal was heard on the 11th and 12th of March, 1878.

Argument.

W. Pearson, Q.C., and *Pugh*, for the Appellants :—

We contend that, after a dissolution under sect. 143, there is no jurisdiction to order a company to be wound up. Creditors have ample means of knowing what is going on, for the winding-up of a company is attended with great publicity, and there is no ground of expediency for cutting down the natural meaning of sect. 143 in order to help creditors who have not thought fit to intervene till the three months have expired. But apart from this general ground, it is clear in the present case the Petitioner knew and assented to everything that was done, and after having assented to the transfer of the whole property of the company to another company which undertakes to pay the mortgage debts, he cannot retain his claim against the original company.

(1) Law Rep. 3 Eq. 69.

Ingle Joyce, for shareholders, supported the appeal.

Latham, *contra*:—

As to dissolution, the 142nd section contains words which override all the sections relating to dissolution; it requires that all the affairs of the company shall have been wound up, and if they have not been fully wound up there is no dissolution: *In re Crookhaven Mining Company* (1).

[JAMES, L.J.:—Can it have been the intention of the Legislature that where the form of proceeding prescribed has been duly complied with the Court shall go behind the return? No wrong is done to creditors by the opposite view. They have ample time to interfere.]

No notice is given to creditors. There is only an advertisement in the *Gazette*, which may well escape their notice. Then as to the other point, it is submitted that a mortgagee does not cease to be a creditor of the mortgagor because he assents to the mortgagor conveying the equity of redemption to some one else.

JAMES, L.J.:—

This case must have been decided under some misapprehension as to the facts. The first point raised is whether the Court has any jurisdiction to make a winding-up order after a dissolution of the company under a voluntary winding-up, and I much doubt whether there is any such jurisdiction. Where there has been a *de facto* winding-up; liquidators appointed; the accounts of the liquidators laid before a meeting, as required by the *Companies Act*, 1862, s. 142; a return duly made to the Registrar, and the statutory period of three months elapsed, it would need a great deal of argument to satisfy me that the Court can go behind the return. The provisions of the Act as to dissolution would be of very little value if a creditor could, after that period, come and open the whole matter because, through mistake, some formality had been omitted, some creditor had not come in, or some asset had been left undiscovered. The only case in which it is desirable that what has been done should be undone is where there has been

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Argument.

Judgment, C. A.
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(1) Law Rep. 3 Eq. 69.

C. A. a fraud by which some one is injured. Such a fraud must be the
 1878 fraud of somebody, and the person guilty of it would be personally
 ~~~~~ liable; but it may be that it would also invalidate the proceedings.  
*In re* Such a case, however, must be established in a petition impeaching  
 PINTO SILVER the proceedings on the ground of fraud, not on a petition alleging  
 MINING COMPANY. that nothing was done under the winding-up.  
 Judgment, C. A.  
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But in the present case I am of opinion that the Petitioner is estopped from disputing the validity of the dissolution. We need not decide that there was any novation, though there appears good reason to contend that there was a novation through the Petitioner's agent. But when a person having knowledge of what is being done assents by his trustees to the transfer of the property of the company to another company, being aware that the former company was in course of winding up, and takes no step during the whole of that winding-up, it is utterly out of the question that he should be at liberty to come after the lapse of years and upset all that has been done. The petition must be dismissed with costs, and the Appellant must have his costs of the appeal.

Cotton, L.J.

COTTON, L.J.:—

The first question is whether the Court had any jurisdiction to make a winding-up order. I am of opinion that if the conditions of sects. 142 and 143 of the Act have been complied with, the Court has no jurisdiction to make such an order after the expiration of the three months; for the company has ceased to exist, having been wound up in a way which, if the provisions of the Act have been complied with, is as effectual as a winding-up by the Court. It is true that sect. 145 provides that the voluntary winding-up of a company shall not be a bar to the right of any creditor to have it wound up by the Court. But this, in my opinion, only means that a voluntary winding-up shall not be any bar to a creditor who applies for a compulsory winding-up before the company has been dissolved. If he applies before the expiration of the three months there is a company to be wound up, but after that period there is no company. The case before the Master of the Rolls is no authority for the proposition that after the three months the Court has jurisdiction to order a compulsory winding-up; and I am of opinion that it has not.

It is urged that the company has not been completely wound up, and that therefore sect. 143 does not apply. It is not necessary to give any opinion as to what is to be done where there has been a substantial non-compliance with the provisions of the Act, but the mere fact that there are debts remaining unpaid is no such non-compliance, otherwise an insolvent company could never be dissolved; and as to the other matters alleged, I do not think they would justify opening the winding-up if the Court had jurisdiction to do so. Moreover, the Petitioner has substantially been aware of all that has been done; he knew that the property was to be transferred to the other company, and that a final meeting was called to consider the liquidators' account. After having thus lain by, he cannot now come to have the proceedings ripped up.

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THESIGER, L.J. :—

Thesiger, L.J.

If it were necessary to decide the point, I should be disposed to hold that the Court has no jurisdiction to make a winding-up order after the expiration of three months from the close of a *de facto* voluntary winding-up. The Act contains provisions affording all reasonable protection to creditors. Sect. 132 provides for the advertisement of the resolution for winding up, so that all persons whose interests are affected may have notice of what is going on. Then, under sect. 142, the final meeting is advertised for at least a month, and by sect. 143 the company is to be deemed dissolved at the expiration of three months from the date of the registration of the return made by the liquidators. Reading sects. 145 and 146 in connection with these provisions, I think it clear that proceedings by a creditor to have the company compulsorily wound up, or to have the winding-up continued under supervision, must be taken before the three months have expired. I do not, however, think that it is necessary on the present occasion to decide that question, for, without going so far as to say that there has been in this case an absolute novation, I am of opinion that there has been such a complete assent by the creditor to the voluntary winding-up as to preclude him from attempting to impeach it. *Gosset*, by his affidavit, says: "During the time that the liquidators of the above-named company were conducting the liquidation of the said company I frequently saw the Petitioner, Mr. *Thomas Key*, and

C. A. had conversations with him respecting the winding-up of the company and the formation of the said *Basye Consolidated Mining Company, Limited*. As the result of such conversation, I am able to state positively that the said Mr. *Key* was perfectly aware of all that took place with reference to the transference of the property of the above-named company to the said *Basye Company*, and also that it was the intention of the liquidators of the above-named company to close the liquidation of the said company, and that the said *Basye Company* was to be substituted for the above-named company as the debtors for the moneys advanced by the mortgagees." This is confirmed by the affidavits of *Cresswell* and *Creamer*. The affidavits, it is true, are in somewhat general language, but the case is one where, if it was intended to dispute the facts to which these witnesses depose, they ought to have been cross-examined. I come clearly to the conclusion that Mr. *Key* assented to the winding-up, and it is out of the question that he should be allowed to come after a lapse of four years to impeach proceedings to which he assented at the time.

Solicitors for Liquidators: *Peckham, Maitland, & Peckham*.

Solicitor for Petitioner: *J. Wilson Heritage*.

Solicitors for Shareholders: *Wansey & Bowen*.

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V.-C. H.

June 18, 19, 20, 23, 25, 26, 27. *Principal and Agent—Sub-Agent—Agent making a Profit by Sale to Himself—Acquiescence.*

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Jan. 14, 15, 18;
March 12.

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[1873 D. 53.]

The Plaintiff, in the year 1868, consigned a ship to *G. & Co. in China* for sale, fixing a minimum price of \$90,000, and requiring cash payment. *G. & Co.* employed the Defendant in Japan to sell the ship, with the same instructions. This was done with the knowledge and consent of the Plaintiff. The Defendant, having vainly attempted to sell the ship on the terms mentioned, took her himself for \$90,000, and about the same time resold her to a Japanese prince for \$160,000, payable as to \$75,000 in cash, and the rest on credit. The Plaintiff was not informed that the Defendant had purchased the vessel himself, or that he had resold it, till June, 1869, after the transaction was completed. The Defendant paid \$90,000 to *G. & Co.*,

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who remitted it to the Plaintiff, and eventually obtained the whole amount of \$160,000 from the Japanese prince. In 1873 the Plaintiff filed a bill in Chancery to compel the Defendant to account for the profit made by him in the resale of the ship:—

Held (affirming the decision of *Hall*, V.C.), first, that the relation of agent and principal was established between the Defendant and the Plaintiff, and existed at the time of the purchase and resale of the ship by the Defendant, and that he was therefore liable to account to the Plaintiff for the profit made by him in the transaction:

Secondly: That there had been no such acquiescence or laches on the part of the Plaintiff as to disentitle him to relief.

Where a wrongful act has been completed without the knowledge or assent of the party injured, his right of action is not ordinarily barred by mere submission to the injury, or even by a voluntary promise not to seek redress; some conduct amounting to release or accord and satisfaction must be shewn; although, on account of laches, relief may be refused under special circumstances.

THE bill in this case was filed by *Edward Münster De Bussche*, a merchant or shipowner in the *Isle of Wight*, against *William John Alt*, who was a member of the firm of *Alt & Co.*, merchants in *Japan*, and sought to make the Defendant liable to account, as the Plaintiff's agent, for profits made by him in the purchase and sale of a steamship called the *Columbine*. The facts which led to the institution of the suit were as follows:—In the year 1868 the Plaintiff was the registered owner of two composite screw-steamers called respectively the *Columbine* and the *Nymph*, subject to a mortgage to Messrs. *John Willis & Son*, merchants in *London*, to secure an account current. Each of the steamers was intended by the Plaintiff, according to his usual course of business, for sale in some port in *India*, *China*, or *Japan*; and in the summer of 1868, by arrangement between the Plaintiff and his mortgagees, who were pressing for payment of the mortgage debt, the vessels were consigned for sale to Messrs. *Gilman & Co.*, a firm of merchants carrying on business at *Hong Kong* and *Shanghai*, in *China*, and at *Yokohama*, in *Japan*. The amount of the mortgage debt was very much below the selling value of the vessels, and although *Willis & Son* took the active part in the original consignment, *Gilman & Co.* subsequently corresponded with the Plaintiff rather than with *Willis & Son*, and acted as his agents in the transaction.

The consignment was announced by *Willis & Son* to *Gilman &*

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Co. on the 3rd of July, 1868, in a letter which contained the following passage:—"The *Columbine* is now at *Bombay*, and if she cannot be sold will take cotton round to *China*, where, if a sale does not take place, we must beg of you to send her with a freight to *Shanghai*, *Nagasaki*, or *Yokohama*, or all three ports if necessary, so as to get her sold as soon as possible. We understand that you have no establishment at *Nagasaki*, but no doubt you can appoint some good agents to do the business; but we have to caution you that great care should be taken in appointing an agent where a sale is likely to be effected, as Mr. *De Busche* will naturally look to us for the proceeds."

The firm of *Alt & Co.*, of which the Defendant was at that time a partner, had three different branches in *Japan*, one at *Nagasaki*, another at *Osaca*, and a third at *Hiogo*, and had been from time to time employed by the Plaintiff as agents for the sale of merchandise. The Defendant was the managing partner at *Osaca* and *Hiogo*, and a Mr. *Hunt* was the manager of the *Nagasaki* branch. The Defendant, learning that the two steamers had been consigned for sale, and having better opportunities than *Gilman & Co.* for disposing of them in *Japan*, suggested to that firm that he should be allowed to do so; and the Plaintiff also, having been informed that the Defendant's house and another Japanese house could sell composite steamers, forwarded the information to *Gilman & Co.* in a letter of the 10th of September, 1868. In the result *Gilman & Co.* authorized the Defendant to sell the vessels; or, in the event of their not being sold, to find employment for them. The Defendant undertook this duty, and the Plaintiff corresponded with the Defendant's manager at *Nagasaki* on the footing of the Defendant having so undertaken it.

On the 23rd of October, 1868, the Plaintiff wrote to *Gilman & Co.* confirming a limit which he had previously mentioned for the price of each of the vessels, namely, \$90,000 net proceeds in *England*, and stating his willingness to allow some portion, suggesting one-third, to remain on credit if good interest were allowed and covered by the guarantee of *Gilman & Co.*; and on the 5th of November in the same year the Plaintiff wrote again to *Gilman & Co.*, withdrawing the requirement of a guarantee from them, and expressing his willingness to allow a credit, if

necessary, of \$20,000 or \$25,000, for six or nine months, secured on the vessel. The Defendant, however, asserted that he was never made acquainted with the fact of the Plaintiff's willingness to allow a credit, and that the instructions which were conveyed to him by *Gilman & Co.*, as coming from *Willis & Son*, were to the effect that only cash was to be taken for the steamers. The evidence on this point was not clear, but the Court of Appeal considered that nothing really turned upon it, and in their judgment assumed the Defendant's assertion to be correct.

For some time prior to the Defendant's employment in connection with the two steamers he had business relations with the Prince of a Japanese district called *Geyskien*, and the Prince had become indebted to him in certain moneys, some of which were payable by him in 1868 and some in 1869. This Japanese Prince was desirous of becoming the purchaser of a steamer, and the Defendant appears very early to have conceived the notion of selling either the *Nymph* or the *Columbine* to him. In the latter part of the year 1868 and the early part of 1869 several letters passed between the Defendant and members of the firm of *Gilman & Co.*, in which the difficulty of obtaining cash for the vessels was stated by the Defendant, and in which he suggested that he should himself become the purchaser, with a view of reselling on credit. *Gilman & Co.*, in their answers to the Defendant, did not appear indisposed to accede to his suggestion, provided the Plaintiff's limit of \$90,000 was obtained; but in the opinion of the Court of Appeal the correspondence failed to establish that any definite arrangement was come to until a date later than the 18th of March, 1869. It appears, however, that before that date the Defendant had brought his negotiations with the officers of the Prince of *Geyskien* for the sale of the *Columbine* by him to the Prince to a close; and on the 24th of February, 1869, an agreement in writing between the Defendant's firm and the Prince's officers was signed at *Osaca*, under which the Defendant was to receive \$160,000 for the vessel, payable as to \$75,000 in cash, and as to the balance in two equal instalments in the fourth and eighth months of the current year according to the Japanese reckoning, that is, in the months of May and September, 1869. The contract was subject to confirmation by the *Geyskien* govern-

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ment, and complete possession of the vessel was not to be given over until full payment was received.

On the same day a further agreement between the same parties was signed, under which, in consideration of the purchase of the steamer, it was arranged that the Prince should pay to the Defendant in the second month of the year 22,400 rios due in the third month, in the third month 23,000 rios due in the fourth month, and in the eighth month 30,723 rios due in the tenth and eleventh months of the preceding year.

These agreements were alleged by the Defendant to have been mere inchoate arrangements, which were subsequently cancelled; but on the 17th of March, 1869, two final agreements were concluded between the same parties, which are in substance to the same effect, except that possession of the ship was to be given on payment of \$75,000, while the bill of sale was to be retained until payment of the whole purchase-money.

These agreements being executed, the crew of the *Columbine* was discharged, possession of the vessel was given to the Prince, and on the 25th of March, 1869, a formal transfer to a trustee for the Prince and the Defendant was executed by the Defendant. During the period over which the transaction with the Prince extended Mr. *Hunt*, the manager of the Defendant's firm at *Nagasaki*, was corresponding from time to time with the Plaintiff, mainly on matters of business unconnected with the sale of the *Columbine*, but incidentally also upon the subject of that vessel; and in a series of letters coming down to as late a date as the 8th of April, 1869, Mr. *Hunt* invariably spoke of the sale of the vessel as about to be effected, or as having been effected, by the Defendant under his employment for that purpose, and there was no intimation of any intention on the part of the Defendant, either conceived or carried out, to change his position of agent for that of purchaser. In a postscript to a letter of the 10th of March, 1869, *Hunt* wrote as follows:—"Since writing the above we are in receipt of advice from our *Hiogo* friends, who state that they are finding constant and remunerative employment for the *Columbine*, and that she was about to proceed on a trip to the Inland Sea for the purpose of being inspected with a view to purchase."

In another letter to the Plaintiff, on the 8th of April, 1869, *Hunt* mentions the fact of a sale having been effected in the following terms:—

“*Columbine*.—This vessel has been sold. Particulars regarding the sale Messrs. *Gilman & Co.*, of *Shanghai*, will doubtless give you by this mail. Our firm at *Osaca* have informed these friends about this subject. Captain *Lobnitz* (of the *Columbine*) is proceeding home by this mail.”

It was admitted by the Defendant that *Hunt* was ignorant of the nature of the transaction which resulted in the sale of the ship to the Prince.

In the correspondence between *Gilman & Co.* and the Defendant, *Gilman & Co.* treated the Defendant as their agent for the sale of the ship, until some time after the transaction had been completed.

On the 12th of March, 1869, the Defendant, in the name of his firm, wrote to *Gilman & Co.* at *Shanghai* as follows:—

“We beg to advise having settled a sale of the steamer *Columbine*, which will enable us to remit you the net limit given our Mr. *Alt* for the vessel by you. Mr. *Lavers* and we hold to your credit 3000 dollars as a deposit on account of the same, which will be forfeited should the arrangements we are making fall through, which please note. Our senior addresses Mr. *Lavers* on this subject, to which we refer you. Please hand us by return the necessary documents to make a legal transfer of the vessel, as we may have to give a bond to the consul here if we require to change the flag before such is received by us.”

At the same time the Defendant wrote a private letter to Mr. *Lavers*, one of the partners in the firm of *Gilman & Co.*, as follows:—

“We now write officially to say we will take the *Columbine* over at the limit named in your letter of the 10th of December, which I hope will be satisfactory, and shew you that I have been correct in my ideas as to the sale of the steamers, and induce you to be a little patient with reference to the *Nymph*, which I am sure we shall be able to settle very soon now. Please let me have transfer

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documents by return, made out in the name of *W. J. Alt*. We shall remit you 90,000 dollars, less our 5 per cent. commission, which we will divide with you in this instance, or will hand your *Yokohama* firm the equivalent of 85,000 dollars at 4s. 6d., plus your commission of $2\frac{1}{2}$ per cent., which comes to nearly the same thing."

On the 18th of March Mr. *Lavers* replied:—

"Yours of the 12th March reached me yesterday, and I am much pleased to hear that there is at last some chance of selling the *Columbine*, although, at the price you name, 85,000 dollars, it cannot be done. By my letters of 20th January to your firm, and 21st January to you, you will not fail to notice that the limit given on these dates was 90,000 dollars, free of commission. Our commission would be 5 per cent., but we should be quite content to divide this with you, say give you $2\frac{1}{2}$ per cent. The steamers would be dirt cheap at this price. We cannot accept 85,000 dollars net with an addition of $2\frac{1}{2}$ per cent. as our commission. Our last instructions from Mr. *De Bussche* are as follows: 'London, 4 March. The limit on the *Columbine* and *Nymph* at 85,000 dollars net in *England*, with the £200 per month added since 1st September for insurance and interest. No deduction from above price of any earnings.'"

Further correspondence took place between the Defendant and *Gilman & Co.*; and although the latter appear ultimately to have acquiesced in the purchase by the Defendant of the *Columbine* at the limit given by the Plaintiff, there was nothing to shew that they were aware of the terms of resale, or of the fact that the Defendant had completed the arrangement for resale before he bound himself to become a purchaser. And Mr. *Lavers* stated in his cross-examination that he was himself ignorant of the terms on which the vessel had been resold.

In the meantime *Gilman & Co.* were also in correspondence with the Plaintiff, and in all their letters to him they spoke of the Defendant as acting as an agent in the sale of the vessel. On the 17th of March, 1869, they wrote as follows:—

"We have just received later advices from *Hiogo*, under date of the 12th instant, by which we are glad to find the Japanese had

entered into positive negotiations for purchase of the *Columbine*, and paid a small amount of money as a guarantee of their good faith in the matter; so that we trust a telegram will reach you in anticipation of this letter, advising actual sale of the steamer on satisfactory terms."

On the 30th of March, 1869, *Gilman & Co.* wrote to the Plaintiff as follows:—

"*Columbine*.—On the 17th inst. we wrote you that our friends in *Japan* had advised us that the steamer was in a fair way of being sold. We have since heard from them to the effect that as they found so much difficulty in making a sale at any price for prompt payment, they will take the steamer over at 90,000 dollars. . . . You will no doubt understand it is unusual to sell steamers to the Japanese for cash, payment in most instances extending over some time; our friends make the above offer, not having actually sold the steamer, but are in hopes of making a resale on credit terms, at a profit sufficient to reimburse them for loss arising out of interest of money, &c."

On the 12th of April, 1869, *Gilman & Co.* communicated the sale of the vessel to the Plaintiff in the following terms:—

"*Columbine*.—We telegraphed our friends in *London* on the 8th inst., to advise *Willis & Son* that this steamer had been sold for 90,000 dollars. Messrs. *Alt & Co.* had effected the sale before receiving our advices communicating your increased limit, to cover £200 per month for marine insurance. As, however, the price obtained is net, the difference is fortunately small, and the 90,000 dollars we shall have pleasure to remit you will nearly cover the amount required for insurance in addition to your former limit of 85,000 dollars. The steamer was transferred at *Hiogo*, where she was sold on the 21st ult., as advised in our telegram."

However, on the 3rd of June, 1869, *Gilman & Co.* wrote to the Plaintiff a letter which contained the following passage:—

"We have now to ask you for our commission on the sale of the *Columbine*. You are aware that the steamer was worked by Messrs. *Alt & Co.* in *Japan*, who afterwards took her over for your limit of 90,000 dollars."

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About the same time, the Plaintiff having received some intimations from *Japan* which aroused his suspicions as to the conduct of the Defendant in the matter of the sale, placed himself in communication with a Mr. *Pitman*, who had been captain of one of his vessels, and with Messrs. *Walsh & Co.*, of *Nagasaki*, for the purpose of obtaining information upon the subject.

On the 17th of April, Mr. *Pitman* wrote to the Plaintiff from *Yokohama* a letter, in which he stated that he had been given to understand that the *Columbine* and *Nymph* had been sold for about \$160,000 each on credit.

Messrs. *Walsh* also wrote on the 17th of April, and informed him that they had heard that the *Columbine* was sold to the Prince of *Geyshien* for \$175,000, mostly on credit, though the reputed sale price at *Hiogo* was only \$90,000.

On the 14th of May Messrs. *Walsh*, in a further letter, wrote as follows:—

“*Columbine*.—I had a long talk over the sale of this steamer with Mr. *Alt*, and he shewed me Messrs. *Gilman's* letters, in which they insisted on a *cash* sale, and would not listen to his proposals of credit, although he pointed out that there was not a single instance on record of a Japanese prince not acting up to his engagements. Finding that they were bent on an *immediate cash* sale, he says he could do no better than sell her at the price of 90,000 dollars. He takes the risk of a five years' credit from the Japanese, and gets (he did not tell me the exact sum) about 175,000 dollars. These circumstances appear to have been known to *Gilmans*, as they held the papers and received the 90,000 dollars, and it was at their option to accept or reject the sale.”

Upon this information the Plaintiff wrote to *Gilman & Co.* on the 30th of July, 1869, as follows:—

“I must draw your attention to the sale of the *Columbine*. I see the result, so far as the remittance is concerned, is £20,500, but this is not the net price free of all charges, disbursements, and commissions, as given by me in my letters of the 25th September and 5th October. I particularly stated free of all disbursements, charges, commissions, &c., that I might receive that sum in full, but I find now that a sum of £1100 has been

debited to her, and I gave it that I might be sure of a certain sum as the result of the sale. When a sum of £1100 is deducted, it makes a considerable difference; however, I must receive it and be content with the sale, though it is quite against my particular limit on the vessel. The Messrs. *Alt & Co.* have made a good bargain, and I think should not only pay you your commission, or divide, which I am told is the custom, but pay the above £1100. 90,000 dollars for a vessel like the *Columbine* is as low a price as they could possibly give."

The sum of \$90,000 was paid or accounted for by the Defendant to *Gilman & Co.*, and by them paid to the Plaintiff or his mortgagees. The Defendant received the agreed price from the Prince of *Geyshien* in the following manner: \$75,000 in various payments upon the 13th of April, 1869; \$4000 on the 18th of September, and the value of the balance of principal and interest amounting to \$93,750 in December, 1869, in rice, which the Prince had agreed to transfer to him. The Defendant stated that he obtained the balance at considerable risk and expense to himself, and had been obliged to enforce his claim by a visit to the Prince's capital in a large American steamer.

The Defendant, in December, 1870, dissolved his connection with his firm of *Alt & Co.*, and in November, 1871, came to *England*, where he from time to time met the Plaintiff without hearing from him any complaints upon the subject of the sale of the *Columbine*. It was however proved that the Plaintiff did not receive from him or any other person any further information as to the terms of the sale of the *Columbine*, beyond what had been given by Mr. *Pitman* and Messrs. *Walsh & Co.* The Plaintiff took no proceedings in the matter till March, 1873, when he required from the Defendant to account, as his agent, for the purchase-money received by him for the *Columbine*, and on the 10th of April, 1873, he filed the present bill, praying a declaration that the alleged purchase by *Alt & Co.* of the *Columbine* on their behalf was fraudulent and void, and that the Defendant might account to him for all moneys paid to him or his firm in respect of the sale of the ship.

In his answer to the bill the Defendant alleged the existence of a custom as to the dealings of agents abroad, in the following

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terms: "It is the common practice where ships or other articles of commerce are consigned by merchants residing in *England* to their foreign agents for the purpose of sale for the principal or consignor to fix a limit or reserved price as the minimum amount for which such ship or other article is to be sold, or as to merchants in *Japan*, at the minimum at which such may be taken over, or taken to and purchased by the merchant. It is, I believe, the fact that such limit or reserved price is not intended by the principal or regarded by the agent as relieving the latter from the obligation of disposing of the article consigned to him for sale at the highest price which he can obtain for it, or from the obligation to account for the full proceeds of sale except where he informs the principal or consignor, or other person for whom he is acting, that he takes to or purchases it at the price named, and such principal or other person agrees thereto, in which case the agent is wholly relieved from any and every such obligation as aforesaid, and has simply to pay or otherwise satisfy the price or sum named, like any other purchaser, and deals with and disposes of the ship or other article as he best can and thinks most desirable for himself for his own benefit."

The Plaintiff having amended his bill, the Defendant put in a further answer, in which he said, "I crave leave to refer to the practice or custom stated in the 12th paragraph of my former answer, and say that not only is there such practice or custom as therein stated, and that the same is, as I submit and believe, a good valid and commercial custom; but it is also a further common and usual custom and practice in *China* and *Japan*, and one which I believe and submit is also a good and valid and commercial custom, for goods to be taken over by commission agents as well as merchants, at the limit placed upon them by the consignor or principal, provided that price is not then below the then cash market value of the goods, and that even without any mention being made of the fact or notice thereof given to the consignor or principal, and the goods or price thereof are accounted for and remitted, and commission charged in the same way as if they had been sold to third parties."

The cause came on for hearing before Vice-Chancellor *Hall* on the 18th of June, 1877.

The documentary evidence on both sides was very voluminous, and several witnesses were examined on both sides in Court.

Dickinson, Q.C., *J. C. Mathew*, *W. Barber*, and *Pollard*, for the Plaintiff.

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Butt, Q.C., *Bristowe*, Q.C., and *T. A. Roberts*, for the Defendant.

Dickinson, in reply.

HALL, V.C., in the course of Mr. *Dickinson's* argument in reply, said :—

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I do not desire you to address yourself to that part of the case which relates to an alleged custom, because, having read the evidence and the pleadings, the conclusion I have arrived at is, that a custom is not proved, and certainly not the custom averred, and that being so, it may be a matter for consideration whether the case which is now made on behalf of the Defendant with reference to an authorized transaction distinguished from custom is really open to him. It may be questioned whether it was competent to the parties, having set up the defence of custom, to fall back and contend that this was a transaction which was authorized by the Plaintiff, through his duly appointed agents. That is the proposition, that *Gilman & Co.*, failing the custom, were agents so far authorized as to employ an agent, giving him authority to do that which in two points of view it may be considered it was at first supposed that *Gilman & Co.* could do themselves, if they thought proper, if they had no agent, and next, supposing they could not do it themselves, that an agent authorized by them might do it, that is to say, they had authority to give to an agent that especial right to take over the goods at a limit. These are considerations which, it seems to me, are not unimportant in the case. What I conceive to be the position of the parties is this, that *Willis & Son* and the Plaintiff jointly arranged that *Gilman & Co.*, who had acted for *Willis & Son* in other transactions, should in this matter have the consignment of the vessel, and should act in substance as consignors for both parties, and that the price in reality to be given was substantially left to the Plaintiff, because in their very first letter they men-

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tioned that they believed that *De Bussche* wanted so much for her, but he would probably take so much. So that, there being property in this case which was no doubt amply sufficient security to cover *Willis & Son*, they left, in other respects, the disposal of the vessel in the hands of *De Bussche*, and therefore there were communications made, almost from the beginning of the transaction, not with *Willis & Son*, but with *De Bussche*. Then as regards the sale, whether it was to be for cash or credit. The impression on *Gilman & Co.*'s mind seems to have been that the Plaintiff would not have accepted a sale except for cash, and that he did not want complicated arrangements. But at the same time, although that might be so, yet there might be proposals made in reference to a sale, although not all for cash. It might probably have been refused by *Willis & Son* if it had been brought to their attention, but unquestionably as regards the sale for cash, so far as *De Bussche* and his interest and authority were concerned, I do not upon the whole consider that cash was, under all the circumstances, a *sine quâ non*.

His Lordship subsequently said :—

Since yesterday I have been able to give considerable time to this case, and although I then was of opinion that it might be more satisfactory to hear further arguments on some of the points, I have since been able to consider them, and to look at the authorities which were referred to, and I will now dispose of the case. I stated yesterday shortly what I considered was the real position of the parties in reference to the sale of the *Columbine*, and the instructions for it, and what I thought in reference to the instructions which were given by *Willis & Son* and by the Plaintiff, either through *Willis & Son* or otherwise, and I do not think it necessary to go through that again ; and what I said must be considered as part of my judgment. I have, however, again looked at the letters and the matters bearing upon them, and the result of further consideration confirms what I have stated before, and I will only say on this head that it appears to me plain, upon the correspondence, that there were no specific instructions from *Willis & Son* not to sell on credit, and there were instructions from the Plaintiff consisting of a number of letters, which at all events did not absolutely forbid, but which previously to the actual transaction authorized a sale on credit.

The Plaintiff seems to have desired, if there was a sale on credit, to have had the guarantee of *Gilman & Co.* for the payment ; but it also seems that he afterwards relaxed that, and would have been willing to sell on credit to a limited extent—to an extent within the margin of the actual sale which took place by the Defendant, upon having a security upon the vessel, about the giving of which it does not appear that there would have been any real difficulty. That being the state of things, however, it is right to say that *Gilman & Co.*'s view was that a sale for cash was the proper thing, and they considered, as representing their principal—and they were quite right in taking that view—that it should be a sale for cash. They did not trust the native princes, although *Alt & Co.* had great confidence in them, and thought they would ultimately pay, although they wanted time. The price was left substantially to the Plaintiff to fix. It is not an unimportant consideration in reference to the transaction generally, to remember that *Willis & Son* never authorized any sale, and must not be considered likely to sanction one, except for cash, and that *Gilman & Co.*, as their agents, in exercising their judgment, would not be ready to sell except for cash. It is admitted that it does not appear that *Gilman & Co.* knew the amount that was owing to *Willis & Son*, and I think it is not unimportant that the amount of the purchase-money to be paid in the case of the *Columbine* formed so large a proportion of the debt owing to *Willis & Son*. It was quite plain that *Willis & Son* were safe, and covered by what would be realized from the *Nymph*, whatever that ship might produce, and it would be something substantial, no doubt. It might be said *Gilman & Co.* did not know what the amount owing on the current account was, and there were some difficulties in communicating with *Willis & Son* and getting instructions about it. Therefore I shall deal with the case upon the footing of *Gilman & Co.*'s exercising a sound discretion in considering that the sale ought to be for cash, they having to protect *Willis & Son*, from whom they had not specific instructions to sell for credit; and that is all, so far as it goes, in favour of the Defendant's view of the matter; and, it has been truly said, it does not appear that the Defendant was made aware of this particular direction from *De Bussche* to sell on credit to a certain extent; therefore,

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as he had been told over and over again that the sale should be for cash, he must have the benefit of that, as it was considered by him that there must be a sale for cash as far as *Gilman & Co.*'s clients or correspondents were concerned.

I will now consider the different points which have been raised on behalf of the Defendant. On the very threshold of his whole case, is the contention that he is only accountable to *Gilman & Co.* [His Lordship then referred to the pleadings and the evidence, and continued:—] When it is said that the Defendant is answerable only to *Gilman & Co.*, it must be remembered that they make common cause with him, of which I do not at all complain. They thought, as they say, they were honestly and fairly acting for their principal. Taking that view of the case, it is manifest that it would really only come to this, that *Gilman & Co.* would not enforce their claim against the Defendant even for the Plaintiff, their principal. That being so, if it were necessary that *Gilman & Co.* should, in point of form, be the actors in calling on the Defendant to account, it would only have been necessary that the Plaintiff should have taken proceedings for liberty to use *Gilman & Co.*'s name as against the Defendant, a mode and form which, under the circumstances of the case, I conceive it was quite unnecessary for him to adopt. But independently of that, the authorities which were referred to do not at all support the proposition that there would be no right under such circumstances for the person aggrieved to go directly against the agent who had profited by the transaction—who was an agent of somebody, and instructed in the matter of the transaction, and who, according to the case alleged, had got, in reality, in his pocket what was the Plaintiff's money. On the contrary, the paragraphs in *Story* on Agency (1) which were referred to, taken in connection with some others, support the view that the principal may go against the ultimate agent under such circumstances.

The next contention was the alleged custom. The Defendant justified his transaction by referring to an alleged custom, and as regards that I have said already that I think it is not, as a matter of fact, by the evidence, which has been given *vivâ voce* as well as by affidavits, made out. I come to the conclusion that such a

(1) Pars. 201, 217 a.

custom has not been proved, and it must be proved upon the most clear and unquestionable evidence. It is against all the principles of the administration of justice, which are founded upon the necessity of rules, such as are enforced in this Court, as between principal and agent for the purpose of protecting the principal not merely against the actual positive wrong of the agent, but also against those possible wrongs of the agent which it is so difficult and almost impossible to ascertain; for it is almost impossible to dive sufficiently into all the motives and knowledge on the part of the agent which it is necessary to think of in considering whether he has acted in the discharge of his duty as agent. It appears to me the correct conclusion is that there was no such custom as that alleged in the first answer, which is the simpler of the two; and as regards the second custom, that the evidence falls much short of establishing it. As regards the custom alleged in the first answer, the allegation is, that "it is the common practice when ships and other articles of commerce are consigned by merchants residing in *England* to their foreign agents"—not confined to any one country—"for the purpose of sale for the principal or consignor to fix a limit or reserved price as the minimum amount for which such ship or other article is to be sold, or as to merchants in *Japan* as the minimum at which such may be taken over or taken to and purchased by the merchant. It is, I believe, the fact that such limit or reserved price is not intended by the principal, or regarded by the agent, as relieving the latter from the obligation of disposing of the article consigned to him for sale at the highest price which he can obtain for it, or from the obligation to account for the full proceeds of sale, except where he informs the principal or consignor or other the person with or for whom he is acting that he takes to it or purchases it at the price named." Now observe, "And such principal or other person agrees thereto, in which case the agent is wholly relieved from any and every such obligation as aforesaid, and has simply to pay or otherwise satisfy the price or sum named like any other purchaser, and deals with and disposes of the ship or other article as he best can and thinks most desirable for himself and his own benefit." At all events, according to that there should be the assent to the transaction of the principal or consignor or other the person with or for whom he

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is acting. If there were such a custom it would have been necessary to state that the agent communicated with the principal, whoever that may mean in this particular case, or the consignor or other the person with or for whom he was acting. There must be the assent of the principal or other person thereto, but of course such principal or other person could not assent thereto without knowing all the circumstances. That is necessarily involved, and it is not made out here that the principal or consignor, or other person, did assent thereto, even if that principal, consignor, or other person be taken to be *Gilman & Co.* as distinguished from the Plaintiff. I think that such a custom as that would be construed very strictly; and inasmuch as this could not have been a taking over within that custom by *Alt & Co.*, if it had been a taking over by *Gilman & Co.*, the original agents, they must have communicated with their principal, and in like manner there ought to have been a communication with and an assent by the principal—the Plaintiff—and not merely with the person who was not in reality himself acting in the matter of the sale, although he was the person authorized to do so. They put somebody else in the position of agent for sale instead of themselves, they having nothing more to do with the transaction apparently after that, than to receive the money, assuming that the persons so substituted—*Alt & Co.*—would do their duty in the matter. However, it is not necessary to determine whether, if there could be such a custom, the assent of *Gilman & Co.* would do, because in fact they did not assent, first, for want of knowledge, and next, because they took a mistaken view entirely with reference to that custom. These considerations are really unimportant. I cannot reconcile the first custom, which requires the assent of the principal, with the other custom alleged in the second answer, which requires no assent at all, and the inconsistency between the two goes far to shew there is no such custom. It is too loose to be considered a custom at all; and in reference to a custom it is not unimportant to bear in mind, in an attempt to establish a known and recognised custom contrary to, and at variance with, the general rules in equity and rights at law as between principal and agent, that *Japan* was the place where the transaction of the sale took place, a country which had established commercial relations with other countries only a

very few years antecedent to the time when the transaction took place.

The next question is : Has the Defendant a case irrespective of custom ?

Upon the evidence there is no trace of any authority given by the Plaintiff to *Gilman & Co.* that they might take over at a price, nor is there any trace of any authority given to them that they might appoint an agent and authorize him to take over at a price. The question is, had *Gilman & Co.*, without express authority in one or other of those respects, authority to do so ? I consider that if *Gilman & Co.* could not do it themselves, neither could any one put into their place for the purpose of a sale ; and also that it was not competent to them to give to any person who was to act in their place in respect of the sale any greater latitude of right in reference to selling to himself than they had to sell to themselves, and therefore, on that ground it seems to me that the case must fail. Is it to be said that the sub-agent was instructed to sell and was at the same time authorized to take over at a price, that he did take over at a price, and that he told *Gilman & Co.*, and that *Gilman & Co.*, exercising a judgment upon it, thought it was for the benefit of their principal that that should be allowed to take place, and that the transaction was therefore indisputable ? In support of that the Defendant's case is that he had ceased to be or to occupy the position of agent, and that he became the purchaser. Excepting an affidavit that he ceased to be the agent and became the purchaser, which is merely a mode of describing the transaction according to the view of the Defendant, there is no evidence to that effect whatever. The fact is, there was no cessation of agency on the part of *Alt* up to the time when he sent a letter saying he took the ship at that price. That it was not deemed entirely hopeless that he would find a purchaser for cash is manifest, I think, because there is one letter in which *Gilman & Co.* mentioned that they still hoped it might be so, notwithstanding it was very difficult, if not almost impossible, to sell, except on credit. The difficulty of the position of the Defendant was to discharge a duty in endeavouring to find a purchaser for cash, and at the same time in looking out for a purchaser on his own account so as to give him a profit if he

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did take over the ship at the price ; those were two such inconsistent things that it is impossible to consider that a purchase under such circumstances by the second appointed or deputy agent was a transaction that could stand according to the law of this Court. It seems to me, therefore, according to the plain principles upon which this Court acts, that the agent so appointed by *Gilman & Co.* was, under the circumstances, not selling according to what the Defendant says were the instructions of the principal to sell for cash, but was departing from those instructions without express authority from the principal, and selling in a different manner ; because he says he could not sell in the way in which he was directed ; and doing that with a view to his own advantage and gain. How can it be contended that if a profit results from that transaction, that the agent is not liable, upon the ordinary principles of equity, in respect of all profit made by him ? The agent must be liable to somebody, and as *Gilman & Co.* repudiated it, the original principal must be able to enforce payment of that which is his own money. Every agent must account for all profit which he makes out of a transaction, and cannot put it into his own pocket, and profit was made by *Alt*, an agent, and therefore it must be accounted for. *Gilman & Co.* did not release him from that accountability, and, as I hold, they could not, and never did, release him effectually from any liability, and being accountable for that profit, upon the ordinary principles of equity, it is recoverable by the Plaintiff, who in some way or another must be able to get that which belongs to him, and whether coming direct to him or through *Gilman & Co.* is a matter to which I need not refer.

That being the principle with regard to accountability, it does not seem to me to be necessary to go with particularity into the question whether or not there was a binding agreement to sell the ship to the Prince antecedent to the time of the communication. That there had been that which amounted to an agreement in a sense though some of the conditions could not be carried into effect : but that there was every probability—almost certainty—of there being an agreement actually come to, is, I think, manifestly clear. If there was not such an agreement come to, at all events the state of things was such that *Alt's* judgment and course

of conduct in his dealing with reference to the ship were so fettered, warped, and influenced by what he was doing with the Prince on his own account, that, if it were necessary to take that into consideration, which under the circumstances I do not think it is, I should hold that under all these circumstances, having regard to his position, he was disqualified, and not able to discharge himself of the duty of agent. He could not say, I will take it under these circumstances for myself as purchaser. I will throw off my duty to the principal and endeavour to find a purchaser for myself. It is not unimportant, in considering the question of whether a purchaser could have been obtained for cash, to look at all the circumstances of the sale to the Prince; but I decide the case on general principles, which disentitle *Alt* to assume and take the position of purchaser. That he never disclosed to *Gilman & Co.* the real transactions or the negotiations between himself and the Prince is plain. It is quite clear that the price was not known until the time when the discovery was obtained in this action. Some attempts were made to learn, and communications were made with reference to the price to Mr. *De Bussche*, and those communications being received, he on one or more occasions said he thought *Alt* had made a very good thing out of it; but some of his expressions may mean that he thought the Defendant had got the ship at a very low price; others, having regard to the information that he had got as to what the price was, may have had reference to that particular price. But that information was in reality all more or less inaccurate. Mr. *De Bussche*, having more or less imperfect information in reference to the transaction, made those observations, but was not able to exercise any judgment as to whether he would affirm or disaffirm it, or question the purchase by the Defendant. He being in that position might be willing to say, "As to the transaction, as far as I know of it at present, I do not know that I shall find fault with it. Of course the money which has been actually transmitted to *England* in respect of it belongs to me, there is no question about that, but whether I am entitled to any more, at present I do not put forward a claim to it." But not putting forward a claim to it may be consistent with his saying, "Well, although I might be willing to sell on credit for a term, with a certain amount to be paid down and a certain amount

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to stand over for some time, I never would have sold for five years' credit, and I would rather have had my \$90,000 at once and affirm the whole transaction."

Those observations tend to shew this, and which I think is the correct view, that in such a state of things the Plaintiff is not precluded by anything that has taken place from asserting his claims. The want of real information would have prevented his making a claim; I think what is called acquiescence is out of the question. In fact, the term is inapplicable; what was said by Lord *Cottenham* in the *Duke of Leeds v. Earl Amherst* (1) shews there was no acquiescence in this case. It may amount—and that is really what the Defendant, in order to make out a case upon the ground of acquiescence or laches, ought to establish—to a release to claim the profit. The law gives to the principal the profit made by the agent. But as to his affirming the transaction of the sale, that was a thing which he was not called upon to do, and he could not have effectually done because the ship was handed over in March and put in the possession of the Prince or his officers; and although the actual transfer of the ship was delayed until September for the want of papers from the proper authority to get rid of the mortgage, and so forth, the thing had substantially gone out of the possession of *Gilman & Co.* and *Alt & Co.* The Plaintiff was at liberty, instead of disaffirming the transaction, to say, "All the profit belongs to me, and I shall claim the benefit of it, and I mean to do so." His not saying that he did mean to claim the profit was no wrong or injury in reality to the Defendant. It is not a wrong in the ordinary sense of allowing a party to deal with a subject-matter in a way that leads him to suppose his dealing with it will not be called in question, because affirming the transaction and not disaffirming it only leaves the Defendant in the position of an accounting party for the profit which he actually made out of the transaction. It appears to me upon every ground there has never been that acquiescence or release of right with knowledge of the actual circumstances of the case which would disentitle the Plaintiff to assert his right to what otherwise belongs to him, namely, an account of the profits made by his agent out of the transaction

on the sale in question. It has been said that it is very hard upon the Defendant; that he had a great deal of trouble to get the money; in fact, that he had almost to go to war with the Prince. That may be. But the Defendant must be taken to have done all that with a knowledge of his accountability, and all proper disbursements and expenses which he may have, or which may have been, properly incurred in reference to getting the proceeds of the sale by him from the Prince, will of course, in taking the account, be allowed. Therefore the result is that the Defendant must personally account to the Plaintiff for all moneys received by or on behalf of the firm of *Alt & Co.* from the purchasers of the steamship *Columbine* in respect of the sale thereof effected by him. There must be an account of all moneys which he has received in respect of the sale, and an account of all moneys which have been paid by the said firm to the Plaintiff "in part payment of the purchase-moneys received by the same firm or any member thereof in respect of the said sale of the said steamship, and that after allowing to the Defendant the proper commission and other usual agent's charges, the Defendant may be ordered forthwith to pay over to the Plaintiff the balance." And in taking these accounts all proper allowances must be made to the Defendant in respect of any disbursements or expenses properly made or incurred by him in reference to the sale. Although these would be payable without being specifically mentioned, he must be entitled to every reasonable and proper disbursement which he has incurred, so as to ascertain what is the fair and clear profit derived from the transaction; and the Plaintiff must have his costs up to the hearing.

From this decision the Defendant appealed. The appeal was heard on the 10th and 11th of December, 1877, and the 14th, 15th, and 18th of January, 1878.

Butt, Q.C., *Bristowe*, Q.C., and *T. A. Roberts*, for the Appellant:—

We contend in the first place that the Defendant *Alt* was not the agent of the Plaintiff but of *Gilman & Co.*, and was only accountable to them. There was no privity from first to last between the Plaintiff and *Alt*. Therefore, if the Plaintiff has any

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ground for relief, he must proceed against *Gilman & Co.*, who were his own agents. In the second place, the transaction was a perfectly fair and legitimate one. *Gilman & Co.* had authority from the Plaintiff to sell to any one for cash at a certain price, and therefore to let *Alt* take the ship for cash at that price. That *Gilman & Co.* had employed *Alt* to look out for a purchaser could not take away their right to sell to him, nor his capacity to purchase.

[JAMES, L.J.:—Is there any authority for the proposition that an agent cannot sell to a sub-agent?]

The Vice-Chancellor held that an agent cannot sell to a sub-agent, but we do not know of any authority for the proposition, and we submit that it cannot be maintained. The Vice-Chancellor's judgment proceeds on a fallacy: he makes out that *Alt* sold to himself; but in fact *Gilman & Co.* sold to him. Again, he considers that *Gilman & Co.* could have called on *Alt* to account for the proceeds, but they clearly could not—it was a sale at a fixed price. It was not necessary for *Alt* to inform *Gilman & Co.* of the negotiations with the Japanese firm for a resale. He was at arm's length with that firm, and they knew that he was trying to sell the ship on credit.

In the third place, the Plaintiff is bound by his acquiescence. The Plaintiff received the \$90,000 soon after the completion of the transaction, and he also knew that *Alt* had sold it for a larger sum partly on credit. He ought to have repudiated the transaction at once or claimed the profits. Although he did not know the whole of the facts he knew enough to put him on inquiry, and, even after he was fully informed, he waited for a long time before he brought forward his claim. His conduct, therefore, amounted to a ratification of the transaction. He has, at all events, been guilty of laches, disentitling him to relief in this Court.

Dickinson, Q.C., and *W. Barber*, for the Plaintiff:—

The Plaintiff's case rests upon the acknowledged principle that an agent, being in a fiduciary relation to his principal, cannot derive a profit out of the transaction without his principal's knowledge and permission. The Defendant was appointed agent for

the sale of the *Columbine* by *Gilman & Co.*, and that appointment being communicated to the Plaintiff and agreed to by him, the Defendant became the Plaintiff's agent: *Fawcett v. Whitehouse* (1); *Hay's Case* (2); *Dunne v. English* (3). The Defendant says that he discharged himself of his agency before the resale by him to the Japanese firm; but that statement is not borne out by the evidence. Neither *Gilman & Co.* nor the Plaintiff was aware of the resale till after the transaction had been concluded. If the Defendant had informed the Plaintiff that he could not sell for cash, the Plaintiff would have permitted him to sell for credit; and, in fact, he had expressed to *Gilman & Co.* his willingness to sell on those terms at any rate if the price was guaranteed by the Defendant. There is no evidence of such a custom as is set up by the Defendant in his defence, for an agent in *Japan* to take the goods himself at the market price, or at the minimum price named by the principal, without his consent. Such a custom would be unreasonable, and could not be acknowledged by the English Courts.

The defence of acquiescence cannot be supported, for the Plaintiff knew nothing of the transaction till after it was concluded. Therefore in order to bind him there must be such acquiescence as amounted to accord and satisfaction, or to a release of his rights: *Duke of Leeds v. Earl Amherst* (4). Nothing of that kind has been shewn here, nor has there been any delay amounting to laches.

Butt, in reply.

1878. March 12. THESIGER, L.J., delivered the judgment of the Court (*James, Baggallay, and Thesiger, L.JJ.*) Judgment, C. A.

After stating the facts of the case as given above, his Lordship continued:—

Upon this state of facts the learned Vice-Chancellor decided that the Plaintiff's claim to receive any profits made by the Defendant out of the transaction of the sale of the *Columbine* was well founded, and decreed the necessary account for the purpose of ascertaining those profits. Against that decree this appeal is

(1) 1 Russ. & My. 132.

(2) Law Rep. 10 Ch. 593.

(3) Law Rep. 18 Eq. 524.

(4) 2 Ph. 123.

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brought. In support of the appeal it has been contended on the part of the Defendant, first, that the relationship of principal and agent was not constituted between the Plaintiff and the Defendant; secondly, that even if it were at one time constituted, the relationship ceased before the sale of the *Columbine* took place; and thirdly, that assuming the Defendant to have been at one time constituted, and to have continued throughout the transaction of sale, the agent of the Plaintiff, the latter has lost by acquiescence any right to follow the profits made by the Defendant out of it.

The first contention raises a question which, as it appears to us, does not present any difficulty. As a general rule, no doubt, the maxim "*delegatus non potest delegare*" applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analyzed merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed "a sub-agent" or "substitute" (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for the sake of brevity); and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen

emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself. The law upon this point is accurately stated in *Story on Agency* (1). A case like the present, where a shipowner employs an agent for the purpose of effectuating a sale of a ship at any port where the ship may from time to time in the course of its employment under charter happen to be, is pre-eminently one in which the appointment of substitutes at ports other than those where the agent himself carries on business is a necessity, and must reasonably be presumed to be in the contemplation of the parties; and in the present case, we have, over and above that presumption, what cannot but be looked upon as express authority to appoint a substitute, and a complete ratification of the actual appointment of the Defendant in the letters which passed respectively between *Willis & Son* and the Plaintiff on the one side, and *Gilman & Co.* on the other. We are, therefore, of opinion that the relationship of principal and agent was, in respect of the sale of the *Columbine*, for a time at least, constituted between the Plaintiff and the Defendant.

Next arises the question whether that relationship ceased before the actual sale of the vessel, and upon this question also we are of opinion that the contention of the Appellant must fail. In the first place it is clear that down to the time of the sale the Plaintiff was no party to any termination of the Defendant's agency, and we think that *Gilman & Co.* could not, after having once appointed and allowed the Defendant to act as agent for the Plaintiff in connection with the proposed sale of his vessel, and without any authority from the Plaintiff, change the Defendant's position in the transaction from that of an agent to that of a purchaser from the Plaintiff. All the reasons which would apply to prevent the original agent from changing his position without the assent of his principal, would equally apply to the case of the substitute, and if such a transaction were held to be valid so as to

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entitle the substitute to make a profit out of it, it would open the door in a variety of cases to agents, who could not themselves directly become purchasers, indirectly doing the same thing through the intervention of substitutes, and to the commission of serious frauds upon principals. But, in the present case, we are also satisfied by the evidence, to which attention has already been directed, that *Gilman & Co.* themselves never assented to the termination of the Defendant's employment as agent for the sale of the *Columbine*, never assented to the Defendant's taking the vessel himself until after the agreement for her sale to the Prince of *Geyshien* was complete. When that agreement was concluded the Defendant was still, in fact and in law, the Plaintiff's agent, and on and from the conclusion of the agreement the Plaintiff was entitled to have the benefit of it, and as a consequence has a right to maintain the present suit unless in some way by his conduct he has deprived himself of that right.

This brings us to the consideration of the contention of the Defendant, founded upon what has been termed "acquiescence" on the part of the Plaintiff. It has been urged that the Plaintiff ought not to be allowed to impeach the validity of the transaction in question, or to follow the profits made out of it after having, with knowledge that the Defendant had become the purchaser of his vessel, assented to the transaction being completed on that footing, received by himself or his mortgagees through the hands of Messrs. *Gilman & Co.* the purchase-money, allowed the Defendant to incur risk and expense which, as agent, he could not have been called upon to incur in obtaining payment from the Prince of *Geyshien*, and finally to dissolve his connection with the firm of *Alt & Co.* upon (as is suggested but not proved) the footing of his freedom from all outstanding claims, and to return to *England* and there reside for a considerable period without any intimation of proceedings being taken against him by the Plaintiff. It is necessary, however, to bring these circumstances to the test of legal principles. It is competent no doubt to a principal to ratify or adopt the act of his agent in purchasing that which such agent has been employed to sell, and to give up the right which he would otherwise be entitled to exercise of either setting aside the transaction or recovering from the agent the profits derived by him from it; and the non-

repudiation for a considerable length of time of what has been done would, at least, be evidence of ratification or adoption, or might possibly by analogy to the *Statute of Limitations* constitute a defence; but before the principal can properly be said to have ratified or adopted the act of his agent or waived his right of complaint in respect of such acts, it should be shewn that he has had full knowledge of its nature and circumstances, in other words, that he has had presented to his mind proper materials upon which to exercise his power of election, and it by no means follows that, because in a case like the present he does not repudiate the whole transaction after it has been completed, he has lost a right actually vested in him to the profits derived by his agent from it. It appears to us also that, looking to the dangers which would arise from any relaxation of the rules by which, in agency matters, the interests of principals are protected, the evidence by which in a particular case it is sought to prove that the principal has waived the protection afforded by those rules, should be clear and cogent.

In the present case, so far from the Plaintiff having had full knowledge of the nature and circumstances of the transaction relating to the sale of the *Columbine*, or the evidence of ratification or adoption being clear and cogent, it is apparent that he was kept in entire ignorance of the amount of the purchase-money payable by, and the terms of the credit given to, the Prince of *Geyshien*, and of the important fact that the Defendant had abstained from binding himself as a purchaser of the vessel until he had obtained the contract for her resale. It is to be observed also, that while the Plaintiff did not in terms repudiate the transaction by which his vessel was sold, and appears to have grumbly submitted to it as something which he could not help, he at the same time made no statement and did no act from which is to be inferred any condition or stipulation or promise that upon becoming better acquainted with the circumstances of the transaction, he would not enforce his legal rights against the Defendant by claiming from him any profits made out of the transaction. We are of opinion, therefore, that there is no such evidence of ratification or adoption on the part of the Plaintiff of the acts of the Defendant as is sufficient to shew that he waived the protection

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C. A. given by law, and dealt with the agent *quoad* those acts, as a
 1878 person discharged of his agency.

DE BUSSCHE It still remains to be considered whether, short of such ratifica-
 v. tion or adoption, the Plaintiff can be held to have by his conduct
 ALT. in any way precluded himself from taking the present proceedings.
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 — is one which was said by Lord *Cottenham* in *Duke of Leeds v. Earl Amherst* (1) ought not to be used; in other words, it does not accurately express any known legal defence, but if used at all it must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act acquiesced in is in progress or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord *Cottenham* said in the case already cited, is the proper sense of the term "acquiescence," and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding.

Applying the principles above enumerated to the present case—

(1) 2 Ph. 117, 123.

first, it is clear that there was no acquiescence on the part of the Plaintiff in the Defendant becoming the purchaser of the *Columbine* and obtaining the profit of the sale to the Prince of *Geyshien*, at any time before the sale to the Prince was a completed transaction. He said nothing, did nothing, there was nothing which he abstained from saying or doing, by which he induced the Defendant to do, or abstain from doing, anything, or to alter his position before the transaction with the Japanese Prince was completed. *Primâ facie*, therefore, the Plaintiff was entitled to bring his action to recover the profit derived by the Defendant from the transaction. Secondly, there has been no release by the Plaintiff of his right of action, or anything which could be held to amount to accord and satisfaction. Thirdly, assuming that under certain circumstances a person might, by his conduct, whether constituting laches or amounting to an estoppel, entirely preclude himself from enforcing a vested right of action, yet, in the present case, no conduct having that effect can properly be imputed to the Plaintiff. He made no representation to the Defendant that he would not take proceedings. Even if his conduct could under any circumstances be held to have been equivalent to such a representation, or to constitute laches, it was pursued, as already pointed out, in ignorance, due to the Defendant's own concealment, of the terms of the sale to the Prince of *Geyshien*, and especially of the fact that such sale preceded the purchase by the Defendant; and, lastly, the principal element of an estoppel by conduct—namely, that it should have been pursued with the intent or so as to induce the person relying upon the estoppel to act in a particular manner—is here wholly wanting; for the Plaintiff was quite unaware, until after the Defendant's answer to the suit was put in, that the Defendant had run any risk or incurred any expenses in obtaining payment of the price stipulated to be paid by the Japanese Prince. We are of opinion, therefore, that the Plaintiff has not by his conduct in any way precluded himself from taking these proceedings.

In dealing with the case we have put aside one topic which was discussed in the argument for the Appellant, but which is beside the real questions between the parties, namely, the righteousness or unrighteousness of the transaction impugned. The

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law under which an agent is prevented from making a profit out of his employment by acting as a principal instead of as an agent is wholly independent of considerations of this kind, and it is most important in the interests of commercial honesty in general that the honesty of the agent concerned in the particular transaction should not be inquired into as a question upon which its validity depends, for by this strictness the temptation to embark in what must always be a doubtful transaction is removed. If the Defendant could have made out by the most conclusive evidence that \$90,000 in cash was a full, and more than a full, equivalent for the bargain which he got from the Japanese Prince, it would be wholly irrelevant. At the same time we must add that the present case is one which comes very clearly within the mischief which the law is intended to obviate. Looking to the large price which the Defendant stipulated to receive upon his sale of the *Columbine*, and the amount which was to be paid in cash, one cannot but feel some doubt whether his purchaser might not possibly, if the Defendant's own interest had been out of the way, have been induced to give, instead of \$160,000, partly in cash and partly on credit, a sum down in cash exceeding, at least to a small amount, the limit of \$90,000 fixed by the Plaintiff. But even if that were not so, it is, at all events, highly probable that if the offer of the Japanese Prince had been submitted to the Plaintiff he would have been willing to sell direct to him upon the terms of the contract made by the Defendant with him. It is urged, no doubt, by the Defendant that the terms were mixed up with the terms of the contemporaneous contract by which the Defendant gave the Prince further time for payment of debts then due, while hastening the period of payment for those coming due; but when those terms are looked at more closely it becomes apparent that, under any circumstances, the Prince was prepared to give a large sum of money, with a considerable cash payment, for the Plaintiff's vessel; and when it is asked, as it has been in argument, what was the Defendant to do in the face of the alleged positive prohibition to sell for anything but cash, the answer is plain—he might have said, and ought to have said, "I cannot get all cash, but I can get so much cash and so much credit from a customer of mine, and if you do not like that, let me accept his offer for

myself, and I will give you your limit in cash." Full opportunity for taking this course, either through the post or by means of the telegraph, was open to the Defendant; but, instead of taking it, he thought proper to conceal altogether from the Plaintiff, from *Gilman & Co.*, and even from his own manager at *Nagasaki*, the real nature of the transaction in which he was engaged; and, although he may have acted without any fraudulent or improper motive, he cannot reasonably be said to be free from blame, or to have a right to complain of consequences which a more due regard to his duty towards his principal could easily have obviated.

One matter alleged by the Defendant, and actually supported by evidence, although in argument admitted to be untenable, ought not to pass without notice and reprobation, namely, an alleged custom or practice in the ports in which the Defendant trades for an agent for sale with a minimum limit himself to take at that limit, and at his own option, the thing he is employed to sell. We cannot but express a hope that the Court will never again hear of such a contention, or have before it such evidence. The fact that there has been a notion entertained by some commercial agents of the existence of such a custom or practice may go far to explain how such a transaction as that complained of in this suit came to be.

In conclusion, we are of opinion that, although some hardship may have been caused to the Defendant by the delay of the Plaintiff in taking these proceedings, he has, nevertheless, most properly been made liable in them; that the decree of the Vice-Chancellor should in all respects be affirmed, and the appeal be dismissed, with costs.

Solicitors for Plaintiff: *Tatham, Oblein, & Nash.*

Solicitor for Defendant: *G. Badham.*

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March 13.

Voluntary Settlement—Agreement by Infant to settle—Ratification—Postnuptial Settlement in pursuance of Ant-nuptial Agreement by Infant—Statute of Frauds—Lord Tenterden's Act—Practice—Appeal—Rules of Court, 1875, Order LVIII., r. 15.

5 QB D 370

In 1857 an infant engaged to be married, wrote to his intended wife, promising that on coming of age he would give her seven specified houses. The marriage took place in 1859, after he came of age. In 1872 he executed a deed, not referring to any previous agreement, by which he conveyed the above and two other houses to trustees upon trust for his wife for life, for her separate use, and after her death upon trust for himself for life, and after the death of the survivor, upon such trusts as the wife should by deed or will appoint, and in default of appointment, in trust for her in fee. He subsequently agreed to sell three of the houses, and the purchaser sued for specific performance :—

Held, by the Court of Appeal (reversing the decision of *Hall*, V.C.), that the purchaser was entitled to specific performance, for that as the settlement did not refer to any previous agreement, dealt with other property than that mentioned in the letter of 1857, and settled the property in a different way, there was no ratification in writing of the promise contained in that letter, and the settlement therefore was voluntary, and void as against a purchaser for value.

An order overruling a demurrer is not an interlocutory order within Rules of Court, 1875, Order LVIII., r. 15.

Statement.

THIS was a purchaser's action for specific performance.

In June, 1876, the Defendant *Charles Shenton* agreed to sell to the Plaintiff three freehold houses, 713, 715, 717, *Old Kent Road, Camberwell*, and received a deposit. The Defendant refusing to complete, the Plaintiff commenced this action against him. The Defendant, by his defence, set up that the property had been settled under the circumstances and in manner following :—

On the 10th of November, 1857, *Shenton*, who was then under age and engaged to be married, wrote to his intended wife as follows :—

“Just a few lines to say that, as I shall come into my property when I become of age, and we are to be married shortly after, I will make you a present of a portion of the property, namely, the

seven houses and shops adjoining the *Turk's Head* in *Melbourne Place, Old Kent Road*, which will bring you in £200 a year, and make you happy for life. I will run over in the course of to-morrow and talk the matter over with you."

The property mentioned in this letter included the houses which formed the subject of the action.

Shenton attained twenty-one before his marriage, which took place on the 16th of June, 1859.

By an indenture dated the 7th of June, 1872, made between *Shenton* of the first part, his wife of the second part, and *Nethercroft* and *Smith* of the third part, reciting that *Shenton*, having made no settlement in favour of his wife on the occasion of their marriage, was now desirous of making a provision for her by post-nuptial settlement, and that there was no issue of the marriage, and that *Shenton* was seised in fee of the messuages thereafter described, with their gardens, &c., and was possessed of and entitled to the household furniture and effects thereafter described, it was witnessed, that in consideration of the natural love and affection which *Shenton* bore towards his wife, as well as for divers other good and lawful considerations, *Shenton* granted to *Nethercroft* and *Smith*, and their heirs, nine houses in the *Old Kent Road*, to hold the same unto and to the use of *Nethercroft* and *Smith*, their heirs and assigns, in trust for Mrs. *Shenton* for life for her separate use, and after her death upon trust for *Shenton* for his life, and after the decease of the survivor upon such trusts as Mrs. *Shenton* should by deed or will appoint, and in default of appointment, in trust for Mrs. *Shenton* in fee. This deed contained no power of sale. *William Easton* was the representative of the surviving trustee of this deed, which included the seven houses mentioned in the letter of 1857.

The Plaintiff demurred to the statement of defence. The demurrer came on to be heard before Vice-Chancellor *Hall*, and his Lordship directed it to stand over for the Plaintiff to amend his statement of claim by adding Mrs. *Shenton* and *Easton* as parties. The Defendants *Shenton* and his wife put in an amended statement of defence to the same effect as the original one, averring that the letter was written in pursuance of a parol promise made to the wife's father for the settlement of the property; that the

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marriage took place on the understanding that the agreement should be confirmed by *Shenton*, and that the settlement, though not expressed to be made in pursuance of the agreement, was made by *Shenton*, and was understood by his wife and her father to have been made in satisfaction or confirmation of that agreement.

The Plaintiff demurred to the amended statement of defence.

The demurrer was heard before Vice-Chancellor *Hall* on the 15th of January.

Argument.

Hastings, Q.C., and *Phear*, for the Plaintiff:—

There was no obligation upon the settlor either in law or equity to make this settlement, it was purely voluntary, and there is no trace upon it of any intention on the part of the settlor to confirm the invalid agreement entered into by him during his minority: *Warden v. Jones* (1); *Doe v. Rowe* (2); *Honywood v. Honywood* (3).

Dickinson, Q.C., and *P. B. Lambert*, for the Defendant *Shenton*, were not called upon.

Dundas Gardiner, for *Easton*.

Lord Tenterden's Act was not pleaded nor mentioned in argument.

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HALL, V.C.:—

I am of opinion that this demurrer must be overruled. The question is not the subject of any express decision, and I must accordingly decide it upon principle. The infant having previous to his marriage entered into a contract in writing, and having after his majority and after his marriage executed a settlement which gave, I think, substantial effect to that contract, I do not think that the settlement so executed was so devoid of consideration as to be within the statute 27 Eliz. c. 4. The contract entered into by the infant was for good consideration; it was not void at law: it was capable of being confirmed by him after he

(1) 23 Beav. 487; 2 De G. & J. 276.

(2) 4 Bing. N. C. 737, 742.

(3) 20 Beav. 451.

3m H.S. 457
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attained his majority, and he having, after coming of age, deliberately settled the property in conformity with the contract, I will not be the first to hold that such a settlement can be defeated as being, under the statute of *Elizabeth*, void as against a subsequent purchaser for value. The limitations in the settlement give to the wife the ultimate fee, and, I think, are conformable to the contract. It might be a question whether, under the letter, she was entitled during her life to her separate use. I think she was: if not, the settlor has so interpreted the letter, and at all events, if she was not so entitled, the difference is unsubstantial for the present purpose, and would only make the settlement voluntary to a limited extent. I do not think it reasonable or sound to hold the settlement to be such an assurance as that Act invalidates. It has recently been held by the Court of Appeal (*Price v. Jenkins* (1)) that a settlement of leaseholds is not voluntary within that statute, and this because of the implied obligation to perform the covenants in the leases. This decision shews that the operation of that statute is not to be extended.

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The Plaintiff appealed. The appeal was heard on the 13th of March.

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Dickinson, Q.C., for the Respondent, took the preliminary objection that the appeal ought to have been brought within twenty-one days: Rules of Court, 1875, Order LVIII., r. 15.

Argument.

JESSEL, M.R.:—An order overruling or allowing a demurrer is not an interlocutory order as respects the time for appealing.

COTTON and THESIGER, L.JJ., concurred.

Hastings, Q.C., and *Phear*, for the Appellant:—

The observations of the Master of the Rolls in *Honywood v. Honywood* (2) support the view that a settlement made after majority, in pursuance of a contract made during infancy, is voluntary.

[JESSEL, M.R.:—You must not rely much on that case, as the order was reversed. The note at the end of the case is wrong in

(1) 5 Ch. D. 619.

(2) 20 Beav. 451.

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stating that it was heard before the full Court. It was taken to the Lord Chancellor at the suggestion of the Lords Justices, and was heard by him in his private room; no formal judgment being given.]

Doe v. Rowe (1) supports the same view. A mere recital of a contract made before marriage will not make a postnuptial settlement one for value: *Warden v. Jones* (2). Then a case of ratification is set up.

[JESSEL, M.R. :—If an infant contracts in consideration of marriage, and formally ratifies the contract by writing after he comes of age, does not the contract become binding on him ?]

Unless the *Infants' Relief Act*, 1874 (37 & 38 Vict. c. 62), applies, which it does not here, the contract does, no doubt, become binding on him; but we submit that his ratification cannot give an instrument a different effect as regards third parties. The settlement was voluntary, because there was no obligation to settle that could have been enforced. The letter, we submit, does not import a concluded agreement, and if it did, there is no confirmation in writing.

[JESSEL, M.R. :—There is no Act requiring confirmation to be in writing except *Lord Tenterden's Act* (9 Geo. 4, c. 14). Does that apply to anything but actions at law ?]

We submit that it is not confined to actions any more than the *Statute of Frauds*, which is similarly worded. The settlement does not refer to any agreement, and it is impossible to make out that there is any ratification in writing of the agreement; the settlement therefore was voluntary.

Dickinson, Q.C., and *P. B. Lambert*, for the Respondents :—

The Appellants ignore the difference between a written confirmation wanted to support an action, and an actual deed carrying into effect the agreement. The marriage is the consideration, and when the conveyance is made it is one for value. The case is quite different from one where it is sought to enforce the agreement.

(1) 4 Bing. N. C. 737.

(2) 2 De G. & J. 76. *4 Jan 1850*

[JESSEL, M.R.:—Do you say, then, that if there is a parol contract before marriage, and a conveyance after marriage in pursuance of it, the conveyance is for value?]

Yes.

[JESSEL, M.R.:—Is not anything voluntary which a man cannot be compelled to do, and receives no consideration at the time for doing?]

Lavender v. Blackstone (1) supports the view that there is consideration enough to keep the settlement out of 27 Eliz. c. 4. The form of the letter is sufficient: *Alt v. Alt* (2); and our contention that the settlement is not voluntary is supported by *Countess Mountague v. Maxwell* (3); *Hodgson v. Hutchenson* (4); *Taylor v. Beech* (5); *Barkworth v. Young* (6); *Randall v. Morgan* (7). As to the settlement including property not comprised in the agreement, that cannot impair its effect so far as regards the property which is in the agreement.

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JESSEL, M.R.:—

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Assuming, in favour of the Respondents, that the letter of the 10th of November, 1857, would in other respects have constituted a sufficient agreement, it appears that *Shenton* when it was written was an infant. He married after attaining twenty-one, and the settlement was not executed till 1872. It further appears that the agreement, if agreement it was, was to settle seven houses on the wife absolutely. The settlement comprised not only these houses, but other real estate, and did not give the property to the wife in fee, but gave it to her for her life for her separate use, with a life estate to the husband before the remainder in fee to the wife. The settlement, then, was made many years after the date of the agreement; it comprises other property; it limits uses different from those mentioned in the agreement; and lastly, it contains no reference, by recital or otherwise, to the agreement.

It was argued for the Respondents, that there has been a ratification by the infant after coming of age, and that a contract for

(1) 2 Lev. 146.

(4) 5 Vin. Abr. 522.

(2) 4 Giff. 84.

(5) 1 Ves. Sen. 297.

(3) 1 Str. 236.

(6) 4 Drew. 1.

(7) 12 Ves. 67.

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value made during minority acquires validity by such a ratification. To this the Appellant replies, that since the passing of *Lord Tenterden's Act* such a ratification must be in writing; that a ratification in writing must be shewn here, and that if there is none the settlement is voluntary. The Respondents, therefore, in order to succeed, must establish a ratification in writing and a conveyance made in pursuance of the agreement so ratified. I do not mean to say that the ratification and the conveyance must be by separate instruments, and cannot be comprised in the same deed. But I say that here there is no ratification in writing. The ratification may be by express reference to the agreement or by implication, but a ratification must appear on the face of the writing. Here there is nothing on the face of the deed from which it can be inferred that there was any agreement, nor anything to shew that the deed was made in pursuance of the agreement. The onus, therefore, being on the Defendants to prove a ratification, they have not proved it. Some observations were made during the argument as to the effect of a subsequent acknowledgment in writing of a contract, and *Barkworth v. Young* (1) was referred to in support of the contention that the settlement was for value, though there was no ratification till after the marriage. The answer to this is given by *Warden v. Jones* (2), which is subsequent in date to *Barkworth v. Young*, and therefore, so far as the two are inconsistent, overrules it. Lord *Cranworth*, there referring to a postnuptial settlement reciting that it was made in pursuance of an antenuptial agreement, says (3): "Lord *Thurlow* decided in *Dundas v. Dutens* (4) that such a settlement is good, and on that decision I will only remark, that if it be a correct view of the law, the whole policy of the statute is defeated. It cannot be enough merely to say in writing, that there was a previous parol agreement. It must be proved that there was such an agreement, and to let in such proof is precisely what the statute meant to forbid." In that short passage the Lord Chancellor disposed of all the other authorities. We were pressed with an old case of *Lavender v. Blackstone* (5), in which Lord *Hale* made a

(1) 4 Drew. 1. 3 Dec 534. (3) 2 De G. & J. 85.

(2) 2 De G. & J. 76. 4 Dec 5269. (4) 2 Cox, 235.

(5) 2 Lev. 146.

remark to the effect that a settlement was not fraudulent under the statute 27 Eliz. c. 4, if made in pursuance of articles entered into during the infancy of the settlor. The answer is, that *dictum* is not law; and in so saying, I am only expressing the result of all the recent authorities. In *Doe v. Manning* (1) Lord *Ellenborough* reviewed the cases, and drew from them the conclusion that if a settlement was voluntary, it was fraudulent within the meaning of the statute. That decision was in 1807, and has been followed ever since, and to cite cases of earlier date with a view to lead the Court to a contrary conclusion, is a mere waste of time. It is not for the Court to go into antiquarian researches and discuss old *dicta* which have been completely disposed of by the current of modern decisions. The settlement being voluntary is void against a purchaser, and I am therefore of opinion that the demurrer ought to have been allowed.

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TROWELL

v.

SHENTON.

Judgment, C. A.
Jessel, M.R.

COTTON, L.J.:—

Cotton, L.J.

I also am of opinion that the demurrer is good. The only question to be decided is whether the settlement was for value or voluntary, and I need not enter upon the question decided in *Doe v. Manning*, to which the Master of the Rolls has referred; for it has long been settled law that every voluntary settlement of land is void as against a purchaser for value under the statute 27 Eliz. c. 4. Here we have a letter which I will assume to be such as would have constituted a good contract if the writer had not been an infant. He, however, was an infant, and the agreement clearly could not be enforced against him unless he ratified it after coming of age. Now, by *Lord Tenterden's Act* (9 Geo. 4, c. 14), s. 5, it is enacted "that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." Is there in the present case any ratification in writing? A ratification in writing must either in terms or on the fair construction of the instrument refer to the contract which is to be ratified, and treat it as a sub-

(1) 9 East, 59.

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sisting contract. Here the settlement does not refer to any contract, it includes other property beside that mentioned in the letter, and therefore may as well refer to some other contract. We need not enter into the question whether, if there had been a distinct reference to the letter, that would have been enough to place matters on the same footing as if there had been a subsisting obligation to execute a settlement. Now here there certainly was not an enforceable contract at the time when the settlement was executed, unless the settlement itself ratified the contract so as to make it enforceable, and, looking at the frame of the settlement, I think it is impossible to make out a written expression of an intention to ratify the contract.

It was urged that, though no action could be maintained for breach of the agreement, yet the settlement was not to be treated as voluntary. *Warden v. Jones* (1) appears to me to decide the exact contrary of this contention. The consideration was held to be insufficient in that case, because the *Statute of Frauds* provided "that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, signed," &c. Here the question does not turn on the *Statute of Frauds*, but on *Lord Tenterden's Act*; but if in one case it is held that a parol contract before marriage cannot support a settlement made after marriage, so here a settlement cannot be supported by an infant's contract of which there is no written confirmation.

It was objected that there could be no specific performance against a married woman; but none is asked against her. She is only brought here that her rights may be bound by the question being decided in her presence.

Thesiger, L.J.

THESIGER, L.J.:—

I agree that the appeal must be allowed. I cannot collect from the deed any intention to ratify the agreement. The deed does not refer to the agreement; fourteen years had elapsed since it was entered into. The property is not the same, and the limitations of the deed are different from those provided for by the

(1) 2 De G. & J. 76. *4 Jan 1826*

agreement. There is not, therefore, any ratification in writing within *Lord Tenterden's Act*, and the deed must be treated as voluntary.

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Solicitors for Plaintiffs: *Russell, Son, & Scott.*

Solicitors for Shenton and Wife: *Lambert, Petch, & Shakspear.*

Solicitors for Easton: *Gowing & Mandale.*

Ex parte JOSELYNE. *In re* WATT.

C. A.

1878

Secured Creditor—Garnishee Order Nisi—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 12, 16, sub-s. 4.

March 14.

A judgment creditor, who, before the filing of a liquidation petition by his debtor, has obtained a garnishee order *nisi* attaching debts due to the debtor, is a secured creditor within the meaning of sects. 12 and 16 of the *Bankruptcy Act, 1869*, and is, therefore, entitled to the attached debts as against the trustee in the liquidation, even though they did not become actually payable until after the commencement of the liquidation.

Emanuel v. Bridger (1) and *Lowe v. Blakemore* (2) followed.

Ex parte Greenway (3) disapproved.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 12th of December, 1877, *Patterson, Law, & Co.* signed judgment in an action in the Common Pleas Division against *George Watt*, for £1234 10s. 5d. On the 28th of December, *Patterson & Co.* obtained from a Master a garnishee order *nisi* against *A. M. Kino*, whereby it was ordered that "all debts owing (or accruing) from the said garnishee to the said judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the said judgment creditors in the Common Pleas Division of the High Court of Justice on the 12th of December, 1877, for the sum of £1234 10s. 5d., and upon which judgment the sum of £1234 10s. 5d. remains due and unpaid;" and it was further ordered that the garnishee should attend at the Chambers of the Judge of the Common Pleas Division on the 10th of

(1) Law Rep. 9 Q. B. 286.

(2) Law Rep. 10 Q. B. 485.

(3) Law Rep. 16 Eq. 619.

Statement.

1164 D 161
— 223
— 946
1464 D 43
47
— 336
Statement.
56 P D 36
1664 D 38
1764 D 26
261
— 157

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WATT.Statement.
—

January, 1878, to shew cause why he should not pay the judgment creditors the debts due from him to the judgment debtor, or so much thereof as might be sufficient to satisfy the judgment debt.

On the 31st of December this order was served on *Kino*. On the 3rd of January, 1878, *Watt* filed a liquidation petition, under which, on the 22nd of January, *J. A. Joselyne* was appointed trustee.

Kino filed an affidavit, whereby he admitted that there was then due and payable from him to *Watt* the sum of £51 15s. 3d.; that on the 11th of March, 1878, there would be due and payable from him to *Watt* the further sum of £266 8s. 6d., and that, on the 15th of April, 1878, the further sum of £68 19s. 8d. would be due and payable from him to *Watt*. On the 4th of February, in the presence of the judgment creditors, the trustee and the garnishee, upon an application to make the order *nisi* absolute, the Master made an order that the garnishee should forthwith pay the sum of £51 15s. 3d. (less costs) to the judgment creditors, and that, in default thereof, execution might issue for the same; and the application was adjourned as to the residue thereof, in order that an application to the Court of Bankruptcy might be made by the trustee. The trustee then applied to the Court of Bankruptcy for an order declaring that the moneys accruing due from *Kino* and attached to answer the debt of *Patterson & Co.* should be paid to the trustee. The Registrar refused the application.

The trustee appealed.

Argument.
—

De Geu, Q.C., and *Finlay*, for the trustee:—

The garnishee order is obtained under Rules of Court, 1875, Order XLV., rule 2. The charge is a general one on all the debts owing from *Kino* to the debtor. In *Ex parte Williams* (1) it was held that an execution creditor, who has only lodged his writ with the sheriff before the filing of a liquidation petition by the debtor, is not a secured creditor, though by sect. 16 of the *Statute of Frauds* the goods are bound as against the debtor from the delivery of the writ. So, in the case of a garnishee order *nisi*, the attached debts are bound as against the judgment debtor, but the judgment creditor is not a secured creditor before an

(1) Law Rep. 7 Ch. 314.

order absolute for payment is made. *Emanuel v. Bridger* (1) may be cited as an authority against us, but in that case the garnishee order had been made absolute. *Ex parte Greenway* (2) is a decision of the Chief Judge in our favour, and it was not cited in *Emanuel v. Bridger*.

[JAMES, L.J.:—A writ of *fi. fa.* only binds the goods if and when the sheriff shall find them within his bailiwick; they are not absolutely bound. In the present case the attached debts are absolutely bound as against the judgment debtor; the order is an order *nisi* only for the purpose of enabling the garnishee to shew that he owes no debt to the debtor.]

The debts are not “charged,” but only “attached.”

[THESIGER, L.J.:—In *Lowe v. Blakemore* (3) the Court of Queen’s Bench disapproved of *Ex parte Greenway*.]

This Court will have, no doubt, to say which of those two decisions is right.

[JAMES, L.J., referred to *Holmes v. Tutton* (4).]

That case arose upon the construction of sect. 184 of the *Bankrupt Law Consolidation Act*, 1849, which was different from sect. 12 of the present Act. It was not a decision that a creditor who had obtained a garnishee order had a security on the bankrupt’s property, but the Court held that, assuming that he had a security, it was not such a security as came within the exception in sect. 184, nor such a security as he could enforce after the bankruptcy. But, under the circumstances of the present case, *Ex parte Greenway* may be followed without overruling the cases in the Queen’s Bench. For some of the debts were not due and payable by *Kino* when the order *nisi* was made; a right of set-off might accrue to him before they became payable. On this point, no doubt, *Tapp v. Jones* (5) is an authority against us.

Winslow, Q.C., and *Edward Pollock*, for *Patterson & Co.*, were not heard.

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Argument.

(1) Law Rep. 9 Q. B. 286.

(3) Law Rep. 10 Q. B. 485.

(2) Ibid. 16 Eq. 619.

(4) 5 E. & B. 65.

(5) Law Rep. 10 Q. B. 591.

C. A. JAMES, L.J.:—

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Judgment,
James, L.J.

11CLD.225
16CLD.381
17CLD.260
— 657/663

I think the decision of the Registrar is right, and that we must follow the decisions of the Court of Queen's Bench, and not that of the Chief Judge in *Ex parte Greenway* (1). It has no doubt been held that the mere delivery of a writ of *fi. fa.* to the sheriff does not put the execution creditor in the position of a secured creditor within the meaning of the *Bankruptcy Act*, 1869. And, on the same principle, it was held in *Holmes v. Tutton* (2) that a garnishee order, though it gave the creditor who had obtained it a security for his debt, did not give him a "lien" within the meaning of the exception contained in sect. 184 of the *Bankruptcy Act*, 1849, and that consequently it could not be enforced after the bankruptcy of the debtor. It is said that we ought now to follow the analogy of the decision in *Ex parte Williams* (3), that when a writ of *fi. fa.* has not been executed by seizure, the creditor has acquired no security upon his debtor's property within the meaning of the *Bankruptcy Act*, 1869. That was, no doubt, a case of some difficulty, and the difficulty arose by reason of the words of sect. 16 of the *Statute of Frauds* (29 Car. 2, c. 3). But we held that the creditor had acquired no security, because, according to well settled law, he had acquired no right of property in the goods. He had acquired a right to seize them, but he acquired no right of property in them till the seizure had been made. And if, before seizure, the goods were removed out of the bailiwick, the creditor would have no right of action, and could recover no damages against the person who removed them. That shews the distinction between *Ex parte Williams* and the present case. The moment the order of attachment was served upon the garnishee the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor. The garnishee could then only pay his debt to the judgment creditor of his original debtor. The property in the debt was transferred, and there was a complete and perfect security the moment the order of attachment was served. The difficulty which arose in *Ex parte Williams* does not arise in this case, and I think that the decisions of the Court of Queen's Bench were correct. There has been a uniform course of decision for more than twenty years, ever

(1) Law Rep. 16 Eq. 619.

(2) 5 E. & B. 65.

(3) Law Rep. 7 Ch. 314.

since *Holmes v. Tutton* (1), in which, though it was not absolutely necessary so to decide, the Court were clearly of opinion that the creditor who had served a garnishee order *nisi* was a secured creditor of his judgment debtor. I am of opinion, therefore, that the Registrar's order was right.

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COTTON, L.J. :—

I am of the same opinion. The question is whether the Respondents became, by virtue of the garnishee order *nisi*, creditors holding security upon the property of the liquidating debtor. I am of opinion that they did. It is called an order *nisi*, but, as against the judgment debtor, it was a final and complete order, transferring at once to *Patterson & Co.* the right to receive any money which might be due from *Kino* to *Watt*. It was an order, *nisi* only as against *Kino*, the garnishee; for of course he was entitled to be heard upon the question whether any money was in fact due from him to *Watt*, and whether he had any right of set-off. But, as between *Patterson & Co.* and *Watt*, no further proceeding had to be taken; as between them, the order was absolute and complete—it was incomplete only as between *Patterson & Co.* and *Kino*. In my opinion, therefore, the order gave *Patterson & Co.* a security upon the debtor's property, though it was to some extent incomplete as against the garnishee. The only other argument for the Appellants is this, that the attached debts were not due and payable at the time when the order was served; but in my opinion that is immaterial. The right of *Watt* to receive the debts was entirely gone, though *Kino* could not be compelled to pay them until the time had arrived when he was bound to pay them. But *Patterson & Co.* acquired a good security upon the attached debt, which was *debitum in præsentia*, though it was *solvendum in futuro*. They were, therefore, in my opinion, when the liquidation petition was filed, in the position of creditors holding security upon a part of the property of the debtor. The Registrar's decision must therefore be affirmed.

THESIGER, L.J. :—

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I am of the same opinion, both on principle and on authority.

(1) 5 E. & B. 65.

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Under sect. 184 of the *Bankruptcy Act* of 1849 the question arose in *Holmes v. Tutton* (1) whether a creditor who stood in a position identical with that of the Respondents was a creditor having security upon the property of a bankrupt, and the Court of Queen's Bench, after taking time to consider, held that he was, though they also held that he did not come within the words of the exception contained in sect. 184 of the Act, and therefore could not enforce his security. There are, no doubt, in the judgment of Lord *Campbell* some expressions upon which may be founded an argument that a creditor who has obtained an order of attachment under the garnishee clauses of the *Common Law Procedure Act* of 1854 is in the same position as an execution creditor who has only delivered his writ of *fi. fa.* to the sheriff. But the question in that case arose under the Act of 1849, and Lord *Campbell's* expressions must be taken in connection with the provisions of that Act. Under the Act of 1869 it has been held that an execution creditor who has levied by seizure on the goods of his debtor is in the position of a creditor holding security on the debtor's property. It was argued by myself in *Ex parte Williams* (2) that it logically followed that an execution creditor who had only delivered his writ to the sheriff was in the same position, inasmuch as the goods were equally bound in the hands of the debtor. But the Court of Appeal held the contrary; and the main reason for their decision was this, that the sheriff could not maintain an action of trover for the goods before he had seized them, for before seizure the goods might be removed out of his bailiwick, and if they were they could not be followed. The question whether a creditor who has obtained a garnishee order is a creditor holding security on his debtor's property has arisen in several cases since the passing of the Act of 1869. In *Ex parte Greenway* (3) the Chief Judge was of opinion that such a creditor was not a creditor holding security, but in so deciding he was going contrary to the considered opinion of the Court of Queen's Bench in *Holmes v. Tutton*, for, now that the exception contained in sect. 184 of the *Bankruptcy Act* of 1849 is removed, *Holmes v. Tutton* amounts to a distinct decision that a creditor in such a position is a creditor holding security on the property of his

(1) 5 E. & B. 65.

(2) Law Rep. 7 Ch. 314.

(3) Law Rep. 16 Eq. 619.

debtor. That was the considered judgment of four Judges of the Court of Queen's Bench, and the question for this Court to decide is whether that judgment or that of the Chief Judge is right. The question has already arisen incidentally in this Court in the case of *Stevens v. Phelps* (1). There the question was whether a garnishee order which had been served upon the executors of a testator whose estate was being administered in the Court of Chancery, the testator being a debtor to the judgment debtor, could be enforced after the bankruptcy of the judgment debtor; and the Court of Appeal held that it could not, on the ground that, when the order was served, there was no debt in the hands of the executors due to the judgment debtor. But the argument turned, in a great measure, upon the question whether the attaching creditor was a creditor holding security on the property of the bankrupt within the meaning of the *Bankruptcy Act*, 1869, and Lord Justice *Mellish* said, "It is not necessary that we should directly decide this point, though I do not differ at all from the opinion of the Judges expressed in *Emanuel v. Bridger* (2); and I think that no distinction can be drawn between that case and the present on the ground that in that case the order was absolute, and in this it was *nisi* only." Upon that point, therefore, Lord Justice *Mellish* agreed with the opinion of the Court of Queen's Bench, who were of opinion that there was no distinction between a garnishee order *nisi* and the subsequent order that the garnishee do pay. *Emanuel v. Bridger* seems, indeed, to amount to an actual decision of the point now before us, by reason of the distinction which the Court there took (3) between the position of a creditor who has obtained an order attaching a debt, and a creditor who has only delivered a writ of *fi. fa.* to the sheriff, because, as soon as the order attaching a debt is served, all is practically done that can be done by the judgment creditor as against the judgment debtor. Of course, if the garnishee does not pay the debt to him, he can go on to obtain execution against the goods of the garnishee; but, as regards the debt itself, he can do nothing more than charge it by means of the order of attachment. That is, in

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(1) Law Rep. 10 Ch. 417.

(2) Law Rep. 9 Q. B. 286.

(3) Law Rep. 9 Q. B. 290.

C. A. my opinion, the true distinction between the present case and *Ex parte Williams* (1).

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The appeal was dismissed with costs.

Solicitors for Trustee: *Wright & Law.*

Solicitor for Respondents: *W. P. Thompson.*

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In re NORWICH PROVIDENT INSURANCE SOCIETY.

1878

BATH'S CASE.

Feb. 13, 27.
March 20.

Company—Power to compromise—Cancellation of Shares—Past Members.

12 Ch D 199
3 Ch D 493-4

A company was established for effecting life insurances and insurances against such other kinds of risk as might thereafter be determined upon by general meeting. In March, 1872, a general meeting resolved that fire insurance and fidelity guarantees should be added to their business. New shares, called B shares, were issued to provide for this new branch of business, which was to form a separate department. The company were shortly afterwards advised that this proceeding was *ultrà vires* and the B shares invalid; and one of the B shareholders obtained from the Court of Chancery an order removing his name from the register on that ground. An arrangement was accordingly made for starting a new company to take up the fire and fidelity guarantee business. The assets of the fire and fidelity department were to be handed over to the new company, which was to undertake the fulfilment of the contracts of that department. The new company was to issue to the B shareholders shares credited with the amounts paid by them respectively on their B shares, and the B shares were to be cancelled. The Appellant, who was a B shareholder, had shares allotted to him accordingly in the new company, and, on the 24th of September, 1873, his B shares were cancelled. On the 25th of April, 1874, a resolution was passed to wind up the old company. The Appellant, having been placed on the list of contributories, applied to have his name removed, which was refused by *Bacon, V.C.*:—

Held, by the Court of Appeal, that the issue of B shares was not *ultrà vires*, and that the B shareholders effectually became shareholders in the company:

But *held*, that a corporation or company has, as an incident to its existence, the same power of compromising claims made against it as an individual has, and that the cancellation of B shares being made as part of a *bonâ fide* arrangement for compromising a dispute whether those shares had been

(1) Law Rep. 7 Ch. 314.

See also annt. 11 Ch D 388

legally issued, was valid ; and that the Appellant, from the time of the resolution for cancellation of his shares, ceased to be a member of the company :

But *held*, that, as the Appellant had legally been a shareholder, the cancellation could not affect any rights previously acquired by creditors ; and that he must be on the list of contributories as a past member.

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THE *Norwich Provident Insurance Society, Limited*, was established under a deed of settlement dated the 20th of November, 1860, with a nominal capital of £50,000 in 5000 shares of £10 each. The 3rd clause gave a very lengthy statement of its objects, which shortly were to effect insurances against or upon the contingency of sickness, ill-health, advanced age, or other personal infirmity, disability, incapacity, or injury ; insurances on any contingencies connected with sickness or health ; insurances on lives or survivorship, or on any contingencies connected with lives or survivorship ; to grant, purchase, and sell endowments by way of annuity ; “and generally to make and effect insurances against all and every kind of risk, special or general, which may be effected according to law, and which may at any time hereafter be determined upon by a general meeting in pursuance of the power contained in the fourth paragraph of clause 13 of these presents, and upon such terms and conditions as may seem reasonable and expedient, having due regard to the business of an insurance society.”

Statement.

The 13th clause gave powers to a special general meeting, by such majority as therein mentioned,—

“(1.) To increase at any one time, or from time to time, the nominal amount of the capital of the *Society*, and for that purpose to create a sufficient number of new or additional shares of such nominal value or values per share, and either wholly or partly with or without special privileges or preferences over the original shares, or any of them, as to the meeting may seem fit ; provided that such addition or additions to the capital of the *Society* do not exceed in the whole, including the original capital of £50,000, the sum of £200,000 ; and provided also, that every such increase in the nominal capital of the *Society* be carried into effect by a supplemental deed of settlement, which shall be executed by the then chairman or any two of the then directors of the *Society* for and on behalf of the *Society*, and on being so exe-

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cuted shall be and become as binding on all the shareholders as if every shareholder had been a party to and executed the same.

“(4.) To amend, add to, or repeal all or any of the clauses or provisions of the deed of settlement of the *Society* which may be in force for the time being, including all or any of the provisions of this present clause, and in so doing to increase or diminish the amount or vary the distribution of the capital, and to alter the nominal value or number respectively of the shares, or any of them, in which the same may be held, and also, subject to the 3rd clause of these presents, to alter the objects, business, and constitution of the *Society*, or any or either of them, as may be thought proper : Provided that no alterations be made in the name or in the 3rd clause of these presents defining the objects of the *Society*, and that no alteration be made in the provisions of the deed of settlement, or any of them, which is inconsistent with this proviso and with the 3rd clause of these presents.”

On the passing of the *Companies Act*, 1862, this company was registered under it.

On the 31st of March, 1872, a special general meeting passed a resolution that the directors should be “empowered to enter into, effect, and carry on the business of insurance against risks by fire, and also the business of guaranteeing the fidelity of clerks, servants, and others, and to make such regulations for the same, to appoint such officers, or to vary the appointment of existing officers, to enter into such contracts and to take such steps as they in their discretion may think proper.”

A special issue of B shares of £1 each was made to provide for this new branch of business, which was to form a separate department; and the policies insuring against such risks contained a clause confining the remedy of the policy holders to the unpaid portions of the B shares and the funds appropriated to this department. The Appellant took 2000 of these shares, which were allotted to him in July, 1873, and he paid 5s. per share, amounting to £500.

Shortly afterwards doubts arose as to the validity of these proceedings, and the *Society* took the opinion of Mr. *Wordsworth*, Q.C., Mr. *Napier Higgins*, Q.C., and Mr. *Cozens-Hardy*, who advised that the *Society* was not empowered, by any words in the deed of settle-

ment, to undertake any other than life business, and that the issue of the B shares was *ultrà vires*. After this one of the B shareholders obtained an order from the Court of Chancery for the removal of his name from the list of shareholders, and for the return of the money he had paid on his shares, on the ground that the issue of them was *ultrà vires*. The facts mentioned in this paragraph were shortly stated in an affidavit by the liquidator without any further particulars than are here given, and there was no further information before the Court on the subject.

The *Society* thereupon resolved to get up another company for the purpose of taking over the fire insurance department of their business. A company was accordingly registered in September, 1873, under the style of *The Norwich Provident Fire Insurance Society, Limited*, which name was afterwards changed to *The Provident Fire Insurance Company, Limited*, and it will be referred to as the *Fire Company*. Along with its memorandum and articles was registered an agreement between the *Society* and the *Fire Company* whereby it was provided, 1, that the *Society* should hand over to the *Fire Company* all effects belonging to the fire department; 2, that the *Society* when called upon should assign to the *Fire Company* the benefit of all agreements relating to the fire department; 3, that the *Fire Company* should take over all policies against fire and guarantees for fidelity which had been issued by the *Society*, and indemnify the *Society* against them; 4, "The *Fire Company* to forthwith issue to the said *Society* or its nominees 30,589 shares of £1 each in the said *Fire Company*, credited with the respective sums paid by the various holders of the said B shares in the said *Society* in substitution for such B shares, and not in any case by way of additional profit or bonus, it being the intention of the said parties hereto that the respective holders of B shares in the said *Society* shall henceforth be and become holders of shares in the said *Fire Company* and be credited with the several amounts paid by them in the said *Society*, and which said last-mentioned shares the said *Society* hereby undertakes to cancel in due form forthwith."

The Appellant on the faith of this applied for 2000 shares in the *Fire Company*, and on the 24th of September, 1873, they were allotted to him, and he was credited in respect of them with

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the £500 which he had paid on his B shares. The great mass of the B shareholders similarly took shares in the *Fire Company* in substitution for their original B shares.

On the same 24th of September, 1873, the directors of the *Society* at a board meeting passed a resolution cancelling a mass of B shares, the holders of which had thus taken shares in the *Fire Company*. Among the shareholders included in this resolution the Appellant was mentioned by name.

Some time after this the *Fire Company* brought an action for calls against the Appellant, who insisted on a right to repudiate the shares on the ground that he had been induced to take his B shares in the *Society* by misrepresentation. The action was compromised on the terms of the Appellant paying £500, and the shares being forfeited. The directors of the company accordingly declared the shares forfeited, and removed the Appellant's name from the list of shareholders on the 12th of February, 1875. The *Fire Company* was ordered to be wound up on the 15th of January, 1876, and the Appellant successfully resisted an attempt to place him on the list of contributories.

At an extraordinary meeting of the *Society*, held on the 25th of April, 1874, a resolution was passed for a voluntary winding-up of the *Society*, and was confirmed on the 30th of May. On the 1st of July, 1874, an order was made for continuing the winding-up under supervision.

Messrs. *Butterworth* in March, 1873, had insured with the *Society* buildings which were burnt down in the following May, and in 1877 a balance of £225 remained due to them. On the 9th of March, 1877, they obtained an order for serving on the B shareholders, who had taken shares in the *Fire Company*, notice to shew cause why they should not be settled on the list of contributories of the *Society*. *Bath* attended and objected to being placed on the list, and his objection was allowed by the liquidator.

On the 2nd of August, 1877, Vice-Chancellor *Bacon*, on an application made against *Alexander* and *Cooke*, two of the persons in the above position, held that they were liable to be placed on the list, and directed that the list should be settled on that footing.

Bath was then placed on the list, and applied to Vice-Chancellor

Bacon to have his name removed. The application was heard in Chambers and refused, without argument, as being covered by the decision in the previous case.

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Argument.

Robinson, Q.C., and Brice, for the Appellant:—

We contend that the creation of the B shares was *ultrà vires*, the company having no power to undertake fire insurance. If so, *Bath* never became a shareholder at all. The cancellation, therefore, was proper and effectual: *Hartley's Case* (1); *Barnett's Case* (2); *Stace and Worth's Case* (3). The general words of clause 3 are cut down by the context, and by clause 13, sub-sect. 4, and fire insurance cannot therefore be brought within the objects of the company: *Ashbury Railway Carriage Company v. Riche* (4); *Ex parte Bagshaw* (5). But, supposing that *Bath* became a shareholder, we contend that he was released by a *bonâ fide* compromise. A shareholder had obtained a decision from the Court that he was entitled to be relieved from his shares, and we contend that the directors were right in acting on that decision: *Barnett's Case*. In *Dixon v. Evans* (6) shareholders were let off on the ground of a compromise; so in *Lord Belhaven's Case* (7); *Wright's Case* (8).

[JESSEL, M.R.:—Have you any case in which this has been held, where the directors had no express power to compromise?]

The point does not appear to have been decided, but we submit that a corporate body must have the same power of entering into *bonâ fide* compromises as an individual. Here three counsel had advised that the issue of B shares was *ultrà vires*, and the Court had decided so, and whether the opinions and decisions were right or wrong there was evidently a real dispute on which a compromise could be based. The shareholder should be released from liability *ab initio*: *Wright's Case*; *Barnett's Case*.

Hemming, Q.C., and T. Brett, for the liquidator:—

If *Bath* was ever a shareholder at all, he must be on the list as a past member, and that will be enough for the liquidator.

(1) Law Rep. 10 Ch. 157.

(6) Law Rep. 5 H. L. 606.

(2) Ibid. 18 Eq. 507.

(7) 3 D. J. & S. 41.

(3) Ibid. 4 Ch. 682.

(8) Law Rep. 7 Ch. 55; Ibid. 12 Eq. 335 n.

(4) Ibid. 7 H. L. 653.

(5) Ibid. 4 Eq. 341.

C. A. [They were then stopped by the Court.]

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Judgment,
Jessel, M.R.

JESSEL, M.R. :—

In this case questions are raised of very considerable importance, upon which I intend to say a few words.

In the first place, has a corporation or *quasi* corporation under the general law the same right to compromise claims brought against it as individual persons have? I cannot bring my mind to doubt the soundness of the affirmative of that proposition. I can see no reason why the general law should put a limit on the authority of corporations who are artificial persons, if I may say so, that it has not put on the authority of natural persons. It seems to me that principle—and authority, so far as it goes, that is the *dictum* of Lord *Westbury* in *Dixon's Case* (1)—point to one conclusion, that corporations must have such power as an incident to their existence. It would be a startling proposition that, whereas an individual may always avoid having resort to litigation by compromising a claim against him, a corporation can never avoid it, but must either fight out the claim or make arrangements sanctioned by the order of a Court of Justice; yet such would be the result of holding that a corporation has no such general power. In the next place, if it were necessary to consider whether sufficient power to compromise was expressly given by the deed of settlement, I should be prepared to decide in the affirmative, but I do not wish to rest my decision upon any such ground.

That being so, the next point we have to consider is whether the compromise, or arrangement by way of compromise, which was come to was made *bonâ fide*. Upon that I have no doubt whatever. Whether or not the reasons given for that arrangement are satisfactory, I must consider for another purpose, but whatever the reasons were, I am satisfied that the compromise was not colourable, was not intended to cover another purpose not disclosed on the face of it, but was a *bonâ fide* arrangement made to carry out the original intention of the parties in another way, when they found out, or believed they had found out, that they could not be carried out in the mode originally suggested.

Now, I come to the next question, Was there in fact any objec-

(1) Law Rep. 5 H. L. 618.

tion to what had been done?—that is, was the original arrangement *ultra vires*. In my opinion it was not. First of all, as a question of construction of the deed of settlement, I have no doubt that the business both of fire insurance and of what they call fidelity guarantee, which is a kind of insurance against fraud by persons employed by others in situations of trust, relate to kinds of risks which can be validly insured against by the law of *England*, and come within the express terms of the 3rd clause. I cannot see that there is any ground for restricting the meaning of the terms of the latter part of that clause, or for applying that which is so often called the doctrine of *noscitur a sociis*, when you cannot suggest a single instance of a risk having any connection with life insurance which is not included in the express terms of the prior part of the clause. It seems to me that the only fair mode of reading the latter part of the 3rd clause, is to read it in its natural and unrestrained sense.

That being so, it appears to me that the arrangement proposed was valid, that the issue of the *B*. shares in the existing company for the purpose of enabling the company to carry on the business of fire insurance and fidelity guarantee insurance was a valid issue, and that the capital raised or proposed to be raised could have been validly and properly devoted to the purpose for which it was intended to be raised, and indeed that the whole arrangement was valid from its inception to its end. The result of that, therefore, would be that *Mr. Bath*, the present Appellant, effectually became a shareholder of the *B* shares of the original company which were issued to him. But the company was afterwards advised that the issue of the shares was *ultra vires* and invalid, and that the arrangement could not be carried out, and both *Mr. Bath* and the other *B* shareholders and the company accepted or adopted the view of their legal advisers. Both parties believing, therefore, that the shareholders were not legally shareholders, agreed to carry out the contemplated arrangement in another way, by starting a new company to carry on the business of fire and guarantee insurance, and to transfer, if I may so say, the shares and deposits of the *B* shareholders to the new company. The mode which they adopted was to agree that the *B* shares in the old company should be cancelled, that the *B* shareholders should become

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shareholders to the same amount in the new company, that the deposits which had been paid should be transferred to the new company, that the new company should take over the fire and fidelity business, which for some months had been carried on by the old company, and should indemnify the old company from all liabilities in respect of that business, of course receiving all payments which had been made to the old company in respect of the business so transferred.

Now what was the legal effect of that arrangement? If I am right in what I have said, that the arrangement being made *bonâ fide*, and being an arrangement for compromise of a question as to whether or not the shares were legally issued, was a valid arrangement, what effect would it have upon the company? Surely it would be valid as between the shareholders represented on the one side by their directors, or rather by the corporate body, which the directors had the power to bind, and the new shareholders, who agreed to cancel their shares and to become from that date shareholders in the new company; but it does not appear to me that that could affect those who had claims against the partnership or *quasi* partnership which had been validly formed, and which had been carried on for some months. The directors could do no more than bind their corporate body as regards the compromise. They could not take away any rights which creditors had acquired. The original issue of B shares being valid, it seems to me that although the B shareholders would from the time of the cancellation cease to be members of the company, they would not be relieved from the consequences of having been members up to the time when the arrangement took place. In this respect the case appears to me to be different from the cases which have been cited. Those were cases in which the original contract was either void or voidable. If it was void, the creditors would have no claim whatever on the alleged contributories, inasmuch as they never had been partners at all. If it was voidable by reason of having its inception in fraud, and notice was given in due time of an intention to avoid it or to refuse to be bound by it, then the contract would be avoided *ab initio*, and no creditor could have the benefit of it as against the different parties who avoided it in due time before the winding-up. It appears to me, therefore, that we

are not bound by those decisions to hold that the company have any power whatever to destroy by the compromise liabilities which had arisen under a valid contract by which a person now alleged to be a contributory had actually become a shareholder in the company before the time of the arrangement.

It appears to me, therefore, that the order of the Vice-Chancellor, which is not to go further, nor is intended to go further, than making the Appellant a contributory as a past member, must be affirmed.

JAMES, L.J. :—

I am of the same opinion; and I do not think it necessary to add anything, except to say that, independently of the power in the deed of settlement, I think we are warranted in holding that a power *bonâ fide* to compromise any dispute whatever is incident to the legal existence of the *persona* of a body corporate or politic, or of associations which are *quasi* corporate.

BAGGALLAY, L.J. :—

I have nothing to add. I have arrived at the same conclusion.

March 20. The case was mentioned again in the minutes; the question being whether the order on appeal, after affirming the decision of the Court below, should go on to say, "But it is at the same time ordered that the said Appellant, *E. A. Bath*, be included in the list of contributories of the company as a past member only of the said company, his membership having ceased on the 24th day of September, 1873." These words were objected to by the liquidator.

Brett, for the liquidator :—

I contend that the effect of the decision of the Court of Appeal was to impose on Mr. *Bath* a present liability for debts incurred before the time when he ceased to be a shareholder, but not to make him a B shareholder within the meaning of the *Companies Act*, 1862, s. 38. There is not here, as in the ordinary case of a past member, a transferee who undertakes to stand in the shoes of

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C. A. the original shareholder. The liquidator, therefore, objects to
1878 the expression that the Appellant is only to be included as a past
BATH'S CASE. member.

Brice, for the Appellant :—

A man may be on the list as a past member although there is no transferee to represent him : *Creyke's Case* (1). The liquidator wants to make out that there are three classes—present members, past members, and present members whose liability terminated on a past day. There cannot be any such threefold division. A man, if he has ever been a member at all, must either be a present member or a past member.

JESSEL, M.R. :—

Our decision went upon this: that the Appellant was under no liability to the company, as he had ceased to be a member, but that as regarded creditors his liability for debts contracted before he ceased to be a member continued. It is immaterial to the creditors whether he is primarily or secondarily liable, and as between himself and the persons who were shareholders in the company at the time of the winding-up, he is not liable. I am of opinion, therefore, that the words objected to ought to form part of the order.

COTTON, L.J. :—

I did not hear the appeal argued, but it appears to me that the continuing members got the benefit of the cancellation of the Appellant's shares, and that as between him and them he is not liable at all. This, however, having taken place within the year, does not displace his liability to creditors for debts incurred while he was a shareholder, and to them he must be liable, but only if the continuing shareholders cannot pay.

THESIGER, L.J., concurred.

Solicitors: *Valpy, Chaplin, & Peckham*; *Tillyard*.

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[1875 D. 6.]

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[1876 D. 56.]

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March 26.

Partnership—Covenant not to engage in any Business except upon the Account and for the Benefit of the Partnership—Remedy for Breach of Covenant—Action for Account of Profits and claiming other Business as Assets of the Partnership.

The Plaintiffs and Defendant, being partners as salt merchants and brokers, mutually covenanted by the partnership articles to diligently employ themselves in the partnership business, and “not to engage, directly or indirectly, in any business except upon the account and for the benefit of the partnership.”

After the expiration of the partnership by effluxion of time, the Plaintiffs discovered that during the partnership the Defendant had been engaged in another business as a salt manufacturer in which he had made profits.

A bill filed by the Plaintiffs to compel the Defendant to account to the partnership for such profits was dismissed without costs; and an action by the Plaintiffs claiming that the Defendant’s interest in the other business formed part of the partnership assets was dismissed with costs.

The decision of the Master of the Rolls affirmed.

BY articles of partnership dated the 28th of August, 1866, the Plaintiffs, *Robert Dean* and *Robert Rayner Dean*, and the Defendant, *Charles Andrew MacDowell*, agreed to carry on the business of salt merchants and salt brokers at *Liverpool* as partners for the term of seven years from the 1st of March, 1866, under the firm of *Dean Brothers*.

Statement.

By clause 8 the partners mutually covenanted to “diligently and faithfully employ themselves in and about the business of the partnership, and carry on and conduct the same to the greatest advantage of the partnership.”

Clause 11 was as follows:—

“Neither of them the said *Charles Andrew MacDowell* and *Robert Rayner Dean* shall, either alone or with any other person, either directly or indirectly, engage in any trade or business except upon the account and for the benefit of the partnership, but the said

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Robert Dean may engage in any other trade or business if he shall think fit."

The partnership was carried on by the Plaintiffs and Defendant until the 1st of March, 1873, when it expired by effluxion of time.

Shortly afterwards the Plaintiffs discovered that the Defendant had, during the last two years of the partnership, been engaged actually, though not ostensibly, as partner in a firm of *Ashton & Sons*, who were carrying on the business of salt manufacturers; the name of the Defendant's son, a youth without capital, having been used in the business as the nominee and representative of the Defendant, who himself contributed the necessary capital. This partnership expired by effluxion of time on the 31st of March, 1873, and then the Defendant, being free from the partnership with the Plaintiff, entered in his own name into the firm of *Ashton & Sons*.

By the time the partnership of *Dean Brothers* had expired, the firm of *Ashton & Sons* had made considerable profits, for which the Plaintiffs, relying on the 11th clause of their partnership articles, required the Defendant to account, which he declined to do. Accordingly, in January, 1875, the Plaintiffs filed a bill to have it declared that the Defendant was bound to account to the firm of *Dean Brothers* for his share of the profits realized by the firm of *Ashton & Sons* between the date of his becoming a partner in that firm and the 1st of March, 1873, the date on which his partnership with the Plaintiffs expired; for an account of the Defendant's share of the profits made by *Ashton & Sons* between those dates; and for consequential relief.

Subsequently, in February, 1876, the Plaintiffs brought a second or supplemental action against the Defendant, insisting that their right in respect of his interest in the firm of *Ashton & Sons* was not confined to his share of the profits as above mentioned, but extended to the whole of his interest; and they accordingly claimed a declaration that his interest in that firm both before and after the 31st of March, 1873, belonged to and formed part of the assets of *Dean Brothers*.

The Defendant, in his answer and statement of defence to the two actions, admitted that the business of *Ashton & Sons* had been carried on for his benefit, but asserted that he had never

interfered in its conduct during the partnership of *Dean Brothers*, and that what he had done tended in reality to benefit and not to injure the partnership.

The Plaintiffs then joined issue, and the two actions now came on for trial.

It appeared from the evidence that there was no rivalry between the two firms of *Dean Brothers* and *Ashton & Sons* during the existence of the first-named firm, who were in fact employed by *Ashton & Sons* as their brokers for the sale of the salt which they manufactured; but after the dissolution of the firm of *Dean Brothers*, *Ashton & Sons* ceased to employ the Plaintiffs as their brokers.

The cause and action came on for hearing before the Master of the Rolls on the 2nd of November, 1877.

Southgate, Q.C., *Chitty*, Q.C., and *Rotch*, for the Plaintiffs:—

We rely on the special contract created by the 11th clause of our articles of partnership, under which the Defendant, if he engaged in any other business, was bound to account for it to the partnership. The clause says that the other business, if engaged in, shall be “on account” and for the “benefit” of the partnership, which must include the right to an account of the profits made in that other business. The partnership having expired, no injunction could reach the Defendant. The clause means that he shall not engage in another business except upon the terms of his accounting for it to the partnership, and to evade that clause he engaged in the business of *Ashton & Sons* in his son’s name instead of his own, thus fraudulently concealing from us his real position.

JESSEL, M.R.:—I only wish to hear you, Mr. *Roxburgh*, on the question of the costs of the first action. The Defendant has clearly committed a breach of the articles. As to the second action, there is no ground for it.

Roxburgh, Q.C., *Davey*, Q.C., and *C. Parke*, for the Defendant:—

Though the Defendant may have committed a breach, no case of fraud is made against him by the bill, and he has therefore been improperly charged with it at the bar.

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In my opinion there is no equity whatever in this bill. As I have often said, upon questions of construction—if there is a question of construction in this case—I am never apt to be very positive as to the correctness of my opinion, but I must say that to my mind there is no question whatever here as to the meaning of clause 11 of the articles. It is a clause as familiar to me as any clause that ever was penned. It is the correlative of clause 8.

Clause 8 means this, that the partner shall devote himself diligently to the business, and clause 11 means that he shall not engage in any other business except on account and for the benefit of the partnership. But there is no covenant that if he does he will account for the profits to the partnership, which is what this bill asks for.

It is a simple breach of covenant by engaging in business indirectly. It does not appear to me at present that he has damaged the partnership at all, but this is not a bill for damages; it is a bill to take an account of the share of the profits made by him in another business in which he engaged by the agency or the intermediacy of a trustee. He was indirectly engaged because he furnished the capital and took the profits. It is not even alleged that he neglected the partnership business or that the partnership sustained any damage whatever.

That being so, it appears to me that such an article is to be enforced, and has been in other cases enforced, when a breach of it has been discovered, either by injunction to restrain the partner committing the breach from engaging in the other business, or by a dissolution. The mischiefs of his engaging in another business are two. It may be that it diverts his mind from the partnership business, and takes away his time and attention, which did not happen in this case; or it may be that it makes him liable for the losses of the other business, and so may involve him and damage the partnership in which he is engaged, and therefore the other partners have an option of intervening by injunction, and that has been the remedy usually adopted; or they may, at their election, dissolve the partnership for breach of the articles.

Those are the two remedies. But ever since the Court of

Chancery existed no one has ever heard of such a bill as this, frequent as the breach, I am afraid, has been. That is pretty good proof that there is no such equity.

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But in addition to that I go upon the plain words of the article. It is a mere negative covenant, and is not an affirmative covenant at all. It does not entitle the Plaintiffs as partners in the business of *Dean Brothers* to take the Defendant's share of the other partnership business, or to intervene in it in any way whatever, as far as I understand that covenant. Therefore, there being no superadded equity, it seems to me that the bill wholly fails, and ought to be dismissed.

As regards the costs, in my opinion what the Defendant did was a breach. It may not have done any harm to the partnership, or it may: I do not see any claim for damages. At the same time a man who enters into engagements of this kind should observe them, and when a bill is brought against him, and more especially when he has not demurred or put in an answer attempting satisfactorily to defend his conduct, I think I must say that he is so blameable for what he did that it warrants me in dismissing the bill without costs.

As to the claim in the second action, in my opinion that is simply extravagant and should be dismissed with costs.

The result therefore is, that the bill in the first suit will be dismissed without costs, and in the second action there will be judgment for the Defendant, with costs.

From this decision the Plaintiffs appealed. The appeal was heard on the 26th of March, 1878.

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Southgate, Q.C., and *Chitty*, Q.C. (*Gazdar* with them), for the Appellants:—

Argument.

Upon the construction of the 11th clause of the articles, we contend that if a partner entered into another business in breach of the articles, the profits were to be held "upon the account and for the benefit of the partnership." But, independently of those words, the Plaintiffs have an equity to claim all profits made by the Defendant in breach of his engagement with them. His breach of the articles was something more than a breach of cove-

C. A. nant between strangers—it was a breach of the fiduciary relation
 1878 which exists between partners. If the Defendant had chosen, he
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 DEAN      might have damaged the firm of *Dean Brothers* greatly by using  
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 DEAN the two firms, and induce *Ashton & Sons* to cease to employ *Dean*
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 MACDOWELL. *Brothers* as their brokers. It is no defence that he did not in fact
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 Argument. do so; he placed himself in a false position by entering into a  
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 relation inconsistent with his duty to the Plaintiffs. The fact
 that he kept the step which he had taken secret from the Plain-
 tiffs, shews that he was conscious that he was committing a breach
 of his duty towards them.

The principle for which we contend is admitted in *Somerville v. Mackay* (1), although the decision was merely as to a right to discovery, and that case has been cited in support of the principle in various text writers and subsequent cases. *Story's Equity Jurisprudence* (2); *Collyer on Partnership* (3); *Bisset on Partnership* (4); *Lindley on Partnership* (5); *Lock v. Lynam* (6); *Russell v. Austwick* (7); *Glassington v. Thwaites* (8). On the same principle we are entitled to share in the value of the Defendant's interest in the new partnership as claimed in the action, for it was obtained through the medium of his connection with *Dean Brothers*.

Roxburgh, Q.C., Davey, Q.C., and C. Parke, for the Defendant, were not called on.

Judgment, C. A. JAMES, L.J. :—
 James, L.J.
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I am of opinion that the order of the Master of the Rolls cannot be reversed or altered. I also think that he is right in saying that the question is quite new in equity (certainly no such case has been cited) whether a mere breach of covenant would entitle a person with whom a covenant has been made to profits. It is quite clear also that in partnership matters there must be the utmost good faith, and that there is to that extent a fiduciary relation between the parties. That is to say, one partner must

(1) 16 Ves. 382.

(2) Par. 669.

(3) 2nd Ed. p. 165.

(4) Page 134.

(5) 3rd Ed. pp. 595, 606, 609.

(6) 4 Ir. Ch. Rep. 188.

(7) 1 Sim. 52.

(8) 1 S. & S. 124.

not directly or indirectly use the partnership assets for his own private benefit. He must not, in anything connected with the partnership, take any profit clandestinely for himself, nor must he carry on the business of the partnership or any business similar to the business of the partnership in his own or another name separate from it, otherwise than for the benefit of the partnership. As Mr. Justice *Lindley* has put it in his book, he must not carry on any other business in rivalry with the business of the partnership, because in truth, if he does carry on the very same business in rivalry with the partnership, the option of the other partners seems to be to say,—That was a business within the scope of the partnership, and although you did it secretly or in connection with some other person, I elect to take the profits of it, because it was part of the business for which the partnership was established, and I elect to say that what you have been doing nominally for yourself, but really for the partnership, was for the benefit of that partnership.

But here, what has been done is this: The Defendant has not entered into any business in any way analogous to or connected with the business of the firm, except in a very trifling manner. The business of the firm was to deal as merchants and brokers, selling on commission the produce of salt works. The business which the Defendant has entered into was that of manufacturing the salt, which was to be the subject-matter of the trade of the first firm. If in that he had in any way deprived the firm of any profits they otherwise would have made—if by his joining in the partnership for the manufacture he had diverted the goods from the firm in which he was a partner to some other firm, I can see that that would be a breach of his duty, but it is not pretended or alleged that any alteration took place in the business of the firm by reason of his having become a shareholder in the other business. It is not pretended that there was any alteration in the commission or anything else. Everything remained exactly as it was, so that it cannot be suggested that there was a farthing's worth of actual damage done to the original firm by reason of his having become a shareholder or partner in the works which produced the thing in which the firm traded.

Under these circumstances, it seems to me that we cannot say his profit from the new business was a benefit arising out of his

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partnership with the Plaintiffs. It was not a benefit derived from his connection with the partnership, or a benefit in respect of which he was in a fiduciary relation to the partnership. His relation to the partnership in this respect was the same as an ordinary covenantor to a covenantee in respect of any other covenant which is broken. It was a covenant by a partner with a co-partner, a covenant that he would not do something which might result in damage. But it was not a covenant, in my view, which was in any way connected with the fiduciary relations between the parties.

That being so, it seems to me that the Master of the Rolls was right in saying that you cannot extend the cases with regard to a share in the profits to a case in which as between the parties there really was nothing but a breach of covenant, which in truth did not result, and could not have resulted, in the slightest loss to the partnership, unless it could have been shewn that it led to the covenantor neglecting the business of the partnership, and devoting himself to other business, and diverting his time and attention from the business to which it was his duty to attend. That would have been a matter for an action for damages if it could have been alleged or shewn here. But there is no allegation of the kind here, nor, indeed, does it appear that he was anything more than a sleeping partner in the business of *Ashton & Sons*. I think, under these circumstances, that, as no damage was sustained or could be sustained, there was no ground for giving an account of profits.

I also agree with the Master of the Rolls in saying this, that the share which the Defendant acquired after the dissolution of the partnership in that new business cannot be considered as something arising from or out of the partnership, as in the case of a partner taking a renewed lease, or anything of that kind. I think that notion is extravagant and entirely without foundation.

On the whole, therefore, I am of opinion that the decision of the Master of the Rolls ought to be affirmed, and the appeal dismissed with costs.

Cotton, L.J.

COTTON, L.J. :—

There is no doubt in this case that the Defendant committed a breach of the partnership articles. That is quite clear. The

only question is, to what are the Plaintiffs entitled? I will first of all deal with the question of the construction of this clause. Does that entitle the Plaintiffs to say, as a matter of construction, that the Defendant, having engaged in this business, did so for the benefit of the partnership and on account of the partnership? I perfectly agree with the Master of the Rolls that this is not the meaning of the covenant—whether it is or not the common form I think is not material—I think it is intended to prevent him from entering into any business except the partnership business. He is to confine his whole time and attention to that; and I think the effect of the covenant is not to enable the parties to say that, besides being restrained from entering into any business, he is also by this covenant, as a matter of construction and as a matter of contract, to give his partners the option of claiming whatever he makes by engaging in any other business as profits made on account of the partnership.

I have more doubt on the general principles of partnership, but the only case which was cited is one entirely different from this—I mean the case of *Somerville v. Mackay* (1). Certainly one is struck with this, that Lord *Eldon* did not express a doubt as to the right to the profits. I think that he did consider the Plaintiffs entitled to an account of the profits, but the cases are entirely different. There the Plaintiff and Defendant had agreed to enter into a joint adventure or partnership for the purpose of exporting goods to *Russia*, and there was a special provision that the partners should not, on their separate account, export goods to that country or to the particular person named; and the Defendant had exported goods to *Russia* and to the person named. In that case, therefore, the business in which he had engaged contrary to the partnership contract was within the scope of the partnership. It was partnership business, except for his attempt to withdraw it from the partnership contract, and to say that he was entitled to the profits of it for his own benefit. That, of course, could not be allowed. But, in my opinion, it has no bearing upon the present case, where the business in which the Defendant engaged was in no way within the scope of the partnership. No doubt it is dealing with the same article—salt, but it is dealing with it in a

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totally different way, and I do not understand that the profit he made was made out of the firm in which he and the Plaintiffs were engaged. The firm in which he, in violation of the partnership contract, engaged, were manufacturers of salt, selling their salt through the firm in which he was engaged with the Plaintiffs. There are clear rules and principles which entitle one partner to share in the profits made by his co-partners. If profit is made by business within the scope of the partnership business, then the partner who is engaging in that secretly cannot say that it is not partnership business. It is that which he ought to have engaged in only for the purposes of the partnership. Again, if he makes any profit by the use of any property of the partnership, including, I may say, information which the partnership is entitled to, there the profit is made out of the partnership property, and therefore, of course, it must be brought into the partnership account. So, again, if from his position as partner he gets a business which is profitable, or if from his position as partner he gets an interest in partnership property, or in that which the partnership require for the purposes of the partnership, he cannot hold it for himself, because he acquires it by his position of partner, and acquiring it by means of that fiduciary position, he must bring it into the partnership account. That is the obligation arising from the fiduciary relation which partners bear one to another. But in the present case, notwithstanding there has been a breach of the contract (and I have dealt with it as a matter of contract), it does not give the Plaintiffs the right they claim. These profits being derived from a trade not within the scope of the partnership business, not having been acquired by him by reason of his connection with the firm, or by any use of the firm's property, in my opinion, the Plaintiffs are not entitled to say, "We will have the profits which you made by engaging in the way in which you did in this entirely separate business."

As regards the second suit, that is disposed of by what I have already said. This property was not in any way acquired by means of his position as partner, and therefore I can see no ground upon which the Plaintiffs can claim to be entitled to that which I assume is valuable property.



THESIGER, L.J.:—

There has been in the present case a clear breach of the clause upon which this question turns, but that clause does not prescribe the remedy or remedies to which the partners may be entitled in the event of such a breach taking place. Consequently we have to look to the general principles of law in order to see what those remedies are, and what is the relief to which these particular Plaintiffs are entitled.

It is clear that, there having been a breach of the contract, an action at law would arise, but that action at law in the present case would not suit the Plaintiffs, because it is not disputed that although the Defendant may have been guilty of a breach of contract, there has been no loss sustained by the partnership in consequence of that breach of contract, and, therefore, although, technically speaking, an action at law would lie, the result of that action would be nothing but nominal damages. The Plaintiffs therefore seek, instead of damages at law, to recover relief by following the profits which have been made by the Defendant. Now, they must obtain those profits upon some well-established principle of law or equity, and I cannot in this case find any such principle.

Several cases were cited by Mr. *Chitty*, and the principles which are to be collected from those cases seem to resolve themselves into three, which have been correctly stated by Mr. Justice *Lindley* in his book upon Partnership (1). The first of those principles is that a partner shall not derive any exclusive advantage by the employment of the partnership property. That principle has been illustrated in two cases which have been cited. The first is the case of *Burton v. Wookey* (2), where mineral ore was obtained by one of the partners by means of the sale of partnership goods. The second of those cases is the case of *Gardner v. McCutcheon* (3), where, two persons being part owners of a ship which was being employed in trading for the common benefit of the part owners, one of those part owners used that ship for the purpose of a private trading of his own, and it was held that the other part owner was entitled to follow the profits thereby

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Judgment, C. A.  
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(1) Page 609.

(2) 6 Madd. 367.

(3) 4 Beav. 534.

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made. The second principle which is to be collected from the cases is, that a partner is not to derive any exclusive advantage by engaging in transactions in rivalry with the firm. That principle is illustrated by the case of *Somerville v. Mackay* (1), if that case is to be treated as a decision at all upon the point. There, the partnership being mainly founded for the purpose of supplying goods in *Russia* to a firm of *Anderson & Co.*, the Defendant himself had during the period of the partnership been supplying goods of the same character to that same firm. Another case to the same effect was the case of *Lock v. Lynam* (2), decided by the Irish Lord Chancellor, in which, the partnership being for the purpose of supplying meat to the Government, one of the partners had been engaged with other persons in the supply of meat to that same Government. The third principle which is to be collected from the cases is, that a partner is not allowed in transacting the partnership affairs to carry on for his own sole benefit any separate trade or business which, were it not for his connection with the partnership, he would not have been in a position to carry on. That has been illustrated by those cases to which Mr. *Chitty* referred of a partner obtaining behind the back of another partner a renewed lease of the premises upon which the partnership business is carried on, and in which it has been held that on the dissolution of the partnership the partnership is entitled to that renewed lease as a part of the assets of the firm. Similar to these cases is that of *Russell v. Austwick* (3), which was a case of a partnership where two persons having joined in business as carriers under a contract with the *Mint* to carry bullion between *London* and *Falmouth*, one of the partners, by virtue of his position as contractor, obtained a further contract in his own name for carrying silver for the *Mint* by another route.

Now, it seems to me that those principles do not in any way apply here. First, there has not been any advantage obtained by the employment of partnership property. Secondly, it is not disputed that the transactions with the other firm were transactions which were in no way in rivalry with the partnership to which the Plaintiffs belonged; and, thirdly, it cannot, as it appears to me, be

(1) 16 Ves. 382.

(2) 4 Ir. Ch. Rep. 188.

(3) 1 Sim. 52.

reasonably argued that the contract of partnership with *Ashton & Sons* was obtained by virtue of, or was in any way a consequence from, the partnership which existed between the Plaintiffs and the Defendant. If we were in the present case to extend the principles beyond those which have been established by previous cases, there is no reason why the Plaintiffs should not have sought to have recovered the profits of any business in which the Defendant might have engaged, although that business might have been entirely unconnected with the subject-matter of the business of the partnership.

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Solicitors: *Cunliffe & Beaumont*, agents for *T. Wilkinson*, and *Bartlett & Atkinson*, *Liverpool*; *F. Venn & Son*, agents for *J. Quinn & Sons*, *Liverpool*.

BRIGSTOCKE v. BRIGSTOCKE.

[1872 B. 77.]

*Fines for Renewal—Tenant for Life and Remainderman.*

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March 27.

In 1838 property was demised for a term determinable on the dropping of three lives, reserving a yearly rent and a heriot payable on the dropping of each life, with a covenant for perpetual renewal at a specified fine on the dropping of each life. In 1869 the persons who had then become absolute owners subject to the lease settled the property in strict settlement, giving to a trustee ample powers of management, with powers to grant leases with or without covenants for renewal, and to perform any covenant for renewal previously entered into by any previous owner, or by the trustee for the time being, so that in every such appointment, lease, or demise, the best rent be reserved without taking any fine or premium. During the continuance of a tenancy for life under this settlement two lives dropped, and on each occasion a heriot was paid and the lease renewed by the trustee at a fine in pursuance of the covenant:—

*Held*, by *Bacon*, V.C., that the fines and heriots ought to be treated as moneys arising under a power of sale and exchange, and to be invested in lands to be settled to the same uses.

*Held*, by the Court of Appeal, that the powers given to the trustee did not affect the question, and that the fines and heriots were casual profits payable to the tenant for life.

BY an indenture dated the 7th of February, 1838, made between *George Player* and *Mary Anne* his wife, of the one part, and *George*

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*Astley* of the other part, *Player* and wife, in exercise of a power of leasing contained in a settlement of the 23rd of July, 1822, under which they were successive tenants for life, demised a piece of land, being the site of a messuage afterwards erected and called *Wellington Lodge*, to *Astley*, his executors, administrators, and assigns, from the 10th of October, 1837, for the term of ninety-nine years, if three persons therein named or any of them should so long live, at the yearly rent of £36, and the payment upon the dropping of each of the lives of £1 10s. for a heriot. The lease contained covenants by *Astley* to build, and a covenant by *Player* and wife that they and their assigns and the person and persons for the time being entitled to the next immediate reversion and inheritance of the demised premises would from time to time and at all times for ever thereafter renew the then present and every future lease of the premises upon the terms therein mentioned, that was to say, upon the death of any one of the lives by which the then present or any future lease should from time to time be determinable, would grant a new lease of the premises to *Astley*, his executors, administrators, and assigns, for a new term of ninety-nine years, determinable with the then two remaining lives and the life of such other person as *Astley*, his executors, administrators, or assigns should nominate for a new life instead of the person so dead, on payment of £180 for a fine, provided such request and nomination should be made and the said fine paid within six months after the death of such life, and afterwards for £360, provided such request, nomination, and payment should be made within six months after the expiration of the first six months, or in default thereof the fine for renewal should be at the will of the lessors. It was not disputed that the power of leasing, which was a special one, authorized these stipulations for renewal, which were admitted to be binding.

The lease was renewed in June, 1874, when a fine of £360 and a heriot of £1 10s. were paid, and again in March, 1875, when a fine of £180 and a heriot of £1 10s. were paid. The question was as to the destination of these sums, amounting to £543, and arose under the following circumstances :—

In 1867 *Elizabeth Lydia* the wife of *Thomas Robert Brigstocke* had become entitled in fee to one moiety of the property subject to the above lease, and of other property.



By indenture dated the 26th of July, 1867, *Brigstocke* and wife assured her moiety of the property to the use of such person or persons for such terms of years, and either absolute or determinable on a life or lives, and at, under, and subject to such yearly rents and other payments, and to such covenants and agreements, as *Brigstocke* during his life, or as Mrs. *Brigstocke* after his death, should grant and demise the said moiety, and subject to any grant or demise to be so made, and also subject to any terms of years then already granted, to the use of Mrs. *Brigstocke* and her assigns during her life for her separate use, with remainder to the use of *Brigstocke* for life, with remainder to such uses as Mrs. *Brigstocke* should by deed or will appoint.

By indenture dated the 1st of September, 1869, Mrs. *Brigstocke*, under the last-mentioned power, appointed that the above-mentioned moiety should, after the decease of the survivor of the husband and wife, and subject to the power of demising contained in the indenture of the 26th of July, 1867, and to all estates created by virtue of that power, remain and be to such uses as *W. Benett P. Brigstocke* (hereinafter called *Benett Brigstocke*) or other the person or persons to be appointed in his place as thereinafter mentioned (all of whom were thereinafter referred to as "the manager") should, during the life of the survivor of the five children of Mr. and Mrs. *Brigstocke*, and the period of twenty-one years after the death of such survivor, in exercise of the powers of management, sale, exchange, and leasing, thereinafter contained, in his and their absolute and uncontrolled discretion, appoint, and in default of such appointment, and so far as no such appointment should extend, to the uses thereinafter declared, namely, as to a certain part of the property described as *George's Moiety and Gatehouse*, to the use of *George C. H. P. Brigstocke* (hereinafter called *George Brigstocke*) for life, with remainder to trustees for a term of 1000 years, to raise portions for his younger children, with remainder to his first and other sons successively in tail, with remainder to his daughters as tenants in common in tail, with cross remainder in tail, with remainder to *Benett Brigstocke* for life, with similar limitations in favour of his issue, with ultimate remainder to the use of the right heirs of Mrs. *Brigstocke*. And as to the rest of the property (hereinafter called *Benett's Moiety*), to

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similar uses, except that the limitations to *Benett Brigstocke* and his issue preceded those to *George Brigstocke* and his issue. Mrs. *Brigstocke* further appointed that it should be lawful for the manager for the time being by deed to appoint in fee or by way of demise or lease, for one or more life or lives, with or without covenants for renewal or for perpetual renewal on the dropping of the lives in any such lease or any of them, or at any certain period, or by way of demise or lease for any term or number of years whatsoever, either certain or determinable, and either with or without covenants for renewal or for perpetual renewal, all and every or any part of the hereditaments to any person or persons and his, her, or their heirs, executors, administrators, or assigns, as the case might require, for the purpose of building, and to perform any covenant for renewal previously entered into by any previous owner, or by the manager for the time being, and also to accept a surrender of any such lease or appointment by way of lease as aforesaid, and if so thought fit the property therein comprised, with the houses and other buildings (if any) thereon erected or any part thereof, to appoint in fee, or by way of demise or lease in the like manner and for the like purpose as thereinbefore mentioned, unto such person or persons as should from time to time apply to make such surrender and for such appointment or demise or lease, with power to the manager to grant such liberties and privileges as therein mentioned to the lessees, so as in and by or upon every such appointment, lease, or demise, there should be reserved and limited or settled and made payable unto or for the benefit of the person or persons successively who under or by virtue of the limitations thereinbefore contained would be or would have been entitled to the premises to be comprised in such appointments, leases, or demises, respectively, in case the same had not been made, the best and most improved yearly rent or rents, sum or sums of money in the nature of a ground rent or ground rents, to commence within ten years from the date thereof, and to be either progressive or not, and to be paid by two half yearly payments in every year that could or might be reasonably gotten for the same (taking into consideration in the case of the renewal of every such lease or demise and in every re-grant or re-demise the value of the

grantee's or lessee's estate and interest then subsisting) without taking any fine or premium, or anything in the nature of a fine or premium, for the making of such appointments, leases, or demises respectively, or for the renewal of any such lease or leases, or for such re-grant or re-demise. The deed conferred upon the manager powers of sale and exchange, with the common trust for investing the moneys received on sale or exchange in the purchase of lands to be settled to the same uses as the lands sold or given in exchange, or for employing them in enfranchising copyholds, subject to the subsisting uses.

The other moiety of the hereditaments, of which one moiety was settled by the last-mentioned deed, was at the time of the partition hereinafter mentioned vested in *Mary H. P. Brigstocke* in fee.

By a deed-poll dated the 9th of December, 1869, some other property was assured to the same uses as those declared in the deed of the 1st of September, 1869.

Mr. and Mrs. *Brigstocke* died in 1871.

On the 23rd of November, 1872, a decree was made in a suit in which *George Brigstocke* was Plaintiff, and *Benett Brigstocke* and *Mary Brigstocke* were Defendants, for a partition of the above property. On the partition the *Wellington Lodge* property comprised in the lease of the 7th of February, 1838, was included in the property allotted to the Plaintiff *George Brigstocke* in severalty as tenant for life of "*George's Moiety*," under the settlement of the 1st of September, 1869.

The question now was whether the £543, consisting of the fines and heriots paid in 1874 and 1875, as mentioned above, belonged to the Plaintiff *George Brigstocke*, or was to be treated as capital in which he had only a life interest. The question was raised on a petition presented by *George Brigstocke*, and Vice-Chancellor *Bacon*, considering the matter concluded by the terms of the leasing power contained in the settlement of the 1st of September, 1869, made a declaration that the £543, and all other the fines and heriots which then were or should thereafter become payable on the making of any renewed lease of the hereditaments in the petition mentioned, pursuant to the powers contained in the indenture of the 1st of September, 1869, and the deed-poll of the 9th of December, 1869, were subject to the trusts declared by the

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Argument.

The Petitioner appealed.

Watson, for the Petitioner :—

The Vice-Chancellor decided on the provision as to letting at the best rent, but the case does not turn on the powers which are inapplicable to the case of compulsory renewal at a fine. The fines must be treated as part of the rents, and the tenant for life must have them just as he receives royalties on an open coal mine, though they are the price of a part of the inheritance: *Milles v. Milles* (1); *Taylor v. Horde* (2); *Simpson v. Bathurst* (3).

Wingfield, *contra* :—

A tenant for life has no power to renew beyond his own life, except under the power, and as the power precludes the taking a fine, the fine must be treated as capital.

[JESSEL, M.R. :—The lease is perpetually renewable. Is not the case like that of fines on the renewal of copyholds? *Earl Cowley v. Wellesley* (4).]

Judgment,
Jessel, M.R.

JESSEL, M.R. :—

I do not differ from the Vice-Chancellor on the point to which his attention was directed, for his Lordship considered that he had only to decide on the construction of the power. I am of opinion that the case does not depend on the power. The manager has power to renew and power to grant leases, including leases to be granted under a covenant for renewal. The power does not provide what is to be done with the fine where the covenant was for renewal at a fine; it might have proceeded to do so, and I should have expected to find there directions as to what should be done with it; but nothing is said, and I am so far from inferring that the manager was to invest the fine, that I think the directions shew that he was not intended to invest it. We are left, then, to the general law. What is the position of the tenant for life of a

(1) 6 Ves. 760.

(2) 1 Burr. 60.

(3) Law Rep. 5 Ch. 193.

(4) 35 Beav. 635.

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settled estate? He takes all casual profits which accrue during the time of his tenancy for life. Thus the tenant for life of a manor takes the fines arising from copyholds, because they become payable under an obligation arising from the custom. In some manors in the West of *England* copyholds are granted for lives, and fines paid on the substitution of fresh lives. These fines are received by the tenant for life. It is said that the tenant for life can admit to the copyholds, and no doubt he can. But why? Because it is necessary to the existence of the custom, which could not otherwise be complied with. The tenant for life of an estate on which there are open mines receives the royalties payable in respect of the minerals gotten, though they are really instalments of the purchase-money of part of the inheritance. In most cases fines are merely a mode of securing rent, and rents of two kinds, an annual rent and a rent payable at more distant intervals. A certain sum payable at certain intervals is as much rent as if it were an annual sum. It is true that a fine is in the nature of a payment of rent beforehand, but a tenant for life is entitled to rent made payable beforehand as much as to any other rent. All the analogies are in favour of the claim of the tenant for life in the present case.

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COTTON, L.J. :—

Cotton, L.J.

I also am of opinion that the order of the Vice-Chancellor cannot be sustained. He decided the case upon the effect of the power in the settlement, but I cannot agree that the power settles the question. He relied on the circumstance that the power in the settlement contained a direction that no fine should be taken. But the settlement also contained a power to perform covenants for renewal previously entered into, and the direction that no fine should be taken cannot apply to the present case, where the property was, at the time when the settlement was made, demised by a lease which contained a covenant for renewal on payment of a fine; and the deed contains no provision that any part of a fine shall be settled. It appears that the Vice-Chancellor would, but for the power, have been in favour of the tenant for life. In most cases where provision is made by a settlement for granting leases at a fine, directions are given for investing the fine as capital, and

C. A. hence a notion has grown up that fines ought to be treated as
 1878 capital. Here the lease was granted before the settlement, and
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 BRIGSTOCKE   there is no direction as to the application of the fines. I can see  
 v.  
 BRIGSTOCKE.   no reason why the tenant for life should not receive the fine for  
 ———      renewal. It is a casual profit, but a casual profit accruing during  
                  the tenancy for life.

THESIGER, L.J.:—

I am of the same opinion.

Solicitor for all parties: *Edward S. Alderson.*

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 March 11.

*Ex parte VINE. In re WILSON.*

*Undischarged Bankrupt—Property passing to Trustee—Damages in Action of  
 Tort—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 4, 15.*

C. A.  
 March 28.

Under the *Bankruptcy Act*, 1869, as before it, damages in an action for a personal tort recovered by an undischarged bankrupt do not pass to his trustee.

Though, if the bankrupt had accumulated the money and invested it in property, the trustee might be entitled to the property, yet he cannot intercept the damages or prevent the bankrupt from expending them in the maintenance of himself and his family.

Decision of *Bacon*, C.J., affirmed.

Statement.  
 ———

ON the 19th of July, 1870, *W. S. Wilson* was adjudicated a bankrupt. On the 1st of August, 1877, he recovered judgment in an action which he had brought in the Exchequer Division against *Charles Davies* for slander, for £250 damages. At this time the bankrupt had not obtained an order of discharge. The trustee in the bankruptcy applied to the County Court at *Liverpool* for an order declaring that the £250 (which had been paid into the Exchequer Division under an order made in the action) was the property of the trustee, and directing payment of the same to him accordingly. The Judge refused the application. The trustee appealed to the Chief Judge. The appeal was heard on the 11th of March, 1878.

*French*, for the trustee, cited *Benson v. Flower* (1); *Brewer v. Dew* (2); *Clark v. Calvert* (3); *Ex parte Banks* (4).

*E. C. Willis*, for the bankrupt, was not heard.

BACON, C.J. :—

Not only is there no authority, but there is no kind of principle to justify this application.

The injury was done to the bankrupt; for that injury he has received compensation, and the trustee never had and never could have had any claim to it.

The case of profits made by a bankrupt in carrying on his former business has been referred to, but this does not resemble that in the slightest degree.

The appeal must be dismissed with costs.

The trustee appealed. The appeal was heard on the 28th of March, 1878.

*J. Macdonell*, for the Appellant :—

The damages have been actually recovered, the money is now in Court, and it is part of the property of the bankrupt which passes to the trustee under sect. 15 of the *Bankruptcy Act*, 1869. I admit that the right of action would not have passed to the trustee: *Brewer v. Dew*; but there Baron *Rolfe* said (5) that, although the assignees might not have a right of action, “the money when recovered might belong to them.” I admit that there is no actual decision in favour of my contention. But there are *dicta* in many of the cases which tend to support it: *Chippendall v. Tomlinson* (6); *Benson v. Flower*; *Hesse v. Stevenson* (7).

[JAMES, L.J. :—Is there any case in which the assignee has been allowed to take the personal earnings of an uncertificated bankrupt?]

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*Ex parte*  
VINE.

*In re*  
WILSON.

Judgment.  
C. J. B.

Argument.

(1) Sir W. Jones, 215; Cro. Car.  
166.

(2) 11 M. & W. 625.

(3) 8 Taunt. 742, 750.

(4) 4 Ch. D. 689.

(5) Page 630.

(6) 4 Doug. 318; 7 East, 57, n.

(7) 3 B. & P. 565, 578.

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*Ex parte*  
VINE.*In re*  
WILSON.Argument.  
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In *Wadling v. Oliphant* (1) it was held that the trustee of an undischarged bankrupt was entitled to damages recovered for his dismissal from his employment without due notice. In *Nias v. Adamson* (2) there are *dicta* of Mr. Justice *Best*, and in *Beckham v. Drake* (3) there are observations of Mr. Justice *Williams* in my favour. *Ex parte Graham* (4) is no doubt a decision of the Chief Judge against me, but it was a decision under sect. 141 of the *Bankruptcy Act*, 1849, and the definition of “property” in sect. 4 of the *Bankruptcy Act*, 1869, is much more extensive; “property” now includes “things in action.”

*E. C. Willis*, for the bankrupt was not heard.

Judgment, C. A. JAMES, L.J. :—  
James, L.J.  
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I am of opinion that the order of the Chief Judge cannot be disturbed. The point has been very well argued by Mr. *Macdonell*; he has said everything that could be said on behalf of the trustee, and no doubt there is room for much argument upon the words of the Act. The general principle always has been that, until a bankrupt has obtained his discharge, all his property is divisible among his creditors. But an exception was absolutely necessary in order that the bankrupt might not be an outlaw, a mere slave to his trustee; he could not be prevented from earning his own living. On that principle the trustee could not sue for moneys due to the bankrupt in respect of his personal labour, and, if the bankrupt could sue for them only for the benefit of his trustee, he would really be without remedy. If he could not sue for damages in respect of a personal wrong, such as the seduction of his daughter, or anything like that, the Courts of the realm would be closed to him for all practical purposes. I believe that never in the whole course of the administration of bankruptcy has an order been made such as that which is now asked for, that is, an order intercepting the damages recovered for a personal wrong done to an uncertificated bankrupt. If the bankrupt had accumulated the money and had invested it in some property, that property might be reached by the trustee. But the fact that he

(1) 1 Q. B. D. 145.

(2) 3 B. &amp; A. 232.

(3) 2 H. L. C. 579.

(4) 21 L. T. (N.S.) 802.



could do that does not enable the trustee to intercept the damages before they reach the bankrupt's hands, or to prevent him, if he has got them, from spending them in the maintenance of himself and his family. The order of the Chief Judge is right, and the appeal must be dismissed with costs.

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1878  
Ex parte  
VINE.  
In re  
WILSON.

COTTON, L.J., and THESIGER, L.J., concurred.

Solicitor for Trustee: *H. G. Field*, agent for *T. Etty*, *Liverpool*.

Solicitors for Bankrupt: *Helder, Roberts, & Gillett*, agents for *Evans & Lockett*, *Liverpool*.

*Ex parte* RABBIDGE. *In re* POOLEY.

C. A.  
1878  
March 28.

*Protected Transaction—Contract for Sale of Land—Payment of Purchase-money to Vendor after Adjudication of Bankruptcy, but without Notice of Adjudication—Rights of Purchaser—Advertisement of Adjudication—Delay—Assignee of Chose in Action—Notice—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 11, 15, 94, 95.*

*1878 D 387*

A bankrupt had, before adjudication, the purchaser having had no notice of any act of bankruptcy, contracted to sell some leasehold property, and had received a deposit in respect of the purchase-money. After the adjudication had been made, but before it had been advertised, the purchaser, having no notice of the adjudication, paid the remainder of the purchase-money to the bankrupt:—

*Held* (reversing the decision of the Registrar), that the trustee in the bankruptcy could not be compelled to assign the lease to the purchaser except upon the terms of his paying the purchase-money.

Whether, if the lease had been assigned before the adjudication, but a part of the purchase-money had not been paid, and the purchaser had, after the adjudication, paid it to the bankrupt, without notice of the adjudication, he could have been compelled to pay it over again to the trustee, *quære*.

Observations per *James*, L.J., on the practice of delaying advertisements of adjudications.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

Statement.

On the 19th of September, 1876, *W. A. Pooley* entered into a contract with *Joseph Dierden* for the sale to him of an undivided moiety of some leasehold property known as the *Oak Brewery*, at

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*Ex parte*  
RAEBIDGE.*In re*  
POOLEY.Statement.  
—

*Canning Town, Essex*, for £725. *Dierden* paid a deposit of £25, and also accepted a bill of exchange for £200 drawn by *Pooley*, in part payment of the purchase-money. At this time proceedings in bankruptcy were pending against *Pooley*, a bankruptcy petition having been presented against him many months previously, but no adjudication had been made. *Dierden* alleged that he had no notice of the petition or of any act of bankruptcy committed by *Pooley* and available against him for adjudication. On the 20th of September, 1876, *Pooley* was adjudicated a bankrupt, but the advertisement of the adjudication was stayed to enable him to appeal against it, and it was not advertised until the 31st of March, 1877. On the 27th of October, 1876, *Dierden* paid *Pooley* £500, the balance of the purchase-money, by means of £150 cash, two acceptances for £125 each, and a third acceptance for £100. The title deeds of the property were handed over to him, but no assignment of the lease was executed. When this transaction took place, *Dierden*, as he alleged, had no notice of the adjudication. After he became aware of it he applied to the Court of Bankruptcy to order the trustee in the bankruptcy to assign the property to him. When he gave notice of the application he had paid two of the acceptances to the holders of them, and before the application was heard he had paid the two other acceptances. The Registrar came to the conclusion, upon the evidence, that, at the time when the contract for sale was entered into, *Dierden* had no notice of the bankruptcy proceedings, or of any act of bankruptcy available for adjudication against *Pooley*, and that, when *Dierden* completed the purchase, he had no notice of the adjudication, and His Honour ordered the trustee to execute an assignment of the bankrupt's interest in the property to *Dierden*.

His Honour was of opinion that, according to the settled practice in bankruptcy, a person who pays a debt to a bankrupt after adjudication, without notice of the adjudication, cannot be compelled to pay it over again to the trustee, and that, consequently, the equitable lien on the property for the unpaid purchase-money ceased to exist when it was paid to the bankrupt, and the trustee in the bankruptcy became a trustee of the leasehold property for the purchaser.

The trustee appealed.

*Winslow*, Q.C., and *J. Shireess Will*, for the Appellant :—

It may be a question whether the agreement of the 19th of September is protected, for we say that *Dierden* had at that time notice of an act of bankruptcy. But, whether that be so or not, the payment of the money after the adjudication is not protected. At that time the legal estate in the leasehold property was vested in the trustee, and he cannot be ordered to assign it to *Dierden*, except on the terms of the unpaid purchase-money being paid to him: *Bankruptcy Act*, 1869, ss. 11, 94, 95.

[They were stopped by the Court.]

*De Gex*, Q.C., and *J. Henderson*, for *Dierden* :—

We admit that the protection given by sects. 94 and 95 does not extend to payments made after adjudication. The protection given by some of the older bankruptcy statutes extended to payments made to a bankrupt even after adjudication, if made without notice of the adjudication. But those statutes only declared the general law in bankruptcy upon which the Registrar has acted in holding the payment good as against the trustee. The Registrar relied upon *Sowerby v. Brooks* (1), which supports his conclusion.

[JAMES, L.J. :—If you are right, the protecting sections 94 and 95 would be nugatory.]

The trustee in the bankruptcy must be taken to have had notice of the contract for sale, because the bankrupt had notice of it. But the Registrar's decision may be supported on the ground that *Dierden* was a trustee of the unpaid purchase-money for the person really entitled to it, and, as he had received no notice of the title of the trustee in bankruptcy, he was entitled to pay the money to the bankrupt, of whose original title alone he was aware. The trustee ought to have completed his title by notice: *Dearle v. Hall* (2); *Loveridge v. Cooper* (3); *In re Hughes' Trusts* (4); *In re Barr's Trusts* (5); *In re Atkinson* (6); *Stocks v. Dobson* (7);

(1) 4 B. & A. 523.

(2) 3 Russ. 1.

(3) *Ibid.* 30.

(4) 2 H. & M. 89.

(5) 4 K. & J. 219.

(6) 2 D. M. & G. 140.

(7) 4 D. M. & G. 11.

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*Ex parte*  
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*In re*  
POOLEY.

Argument.

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*Ex parte*  
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*Stuart v. Cockerell* (1); *In re Russell's Policy Trusts* (2); *Birmingham Banking Company v. Carter* (3). *Lysaght v. Edwards* (4) shews that the trustee in the bankruptcy was a trustee of the property for the purchaser.

JAMES, L.J.:—

It appears to me that the order of the Registrar cannot be sustained. The fallacy of the argument consists in treating the unpaid purchase-money as being simply a *chose in action*, to which cases like *Loveridge v. Cooper* (5) can apply. It is not anything of the kind. The bankrupt, who was the owner of real estate, entered, before the adjudication was made, into a contract to sell it, a contract which I will assume for the present purpose was a transaction protected by sects. 94 and 95 of the Act. The result was that, upon the adjudication being made, the legal estate in the property vested in the trustee in the bankruptcy, subject to the equity of the purchaser under the contract. That equity gave him a right to have the property conveyed to him, upon payment of the purchase-money to the person to whom the property belonged. It is the purchaser's misfortune that he has paid the money to a person who had then ceased to be the owner of the property. But that can give him no equity to take the property away from the real owner without paying him for it. It is nothing more than a case where the purchaser of property has paid his purchase-money to a person whom he thought to be the owner of the property, but who was not so in fact. Is there in such a case any equity to take the property away from the real owner without paying him the purchase-money? I am of opinion that there is not. The order of the Registrar must therefore be discharged.

Cotton, L.J.

COTTON, L.J.:—

I also am of opinion that the Registrar's order is wrong. The whole difficulty has arisen from considering the trustee in the bankruptcy as if he were an assignee of the purchase-money as a

(1) Law Rep. 8 Eq. 607.

(3) 20 W. R. 354.

(2) Ibid. 15 Eq. 26.

(4) 2 Ch. D. 499.

(5) 3 Russ. 30.



*chose in action*, and nothing else. He had vested in him the estate of the bankrupt in the property. He was not in the fullest sense of the word a trustee of the property for the purchaser, because the whole of the purchase-money had not been paid. But he took the legal estate in the property, subject to the equity of the purchaser under the contract, which gave the purchaser a right to say, Convey me the estate on my paying the purchase-money. The purchaser has chosen voluntarily to pay the money to the bankrupt; the bankrupt could not have compelled him to pay it, because he was not in a position to say that he was ready and willing to convey the estate. The purchaser has paid the money to a person who has no title to the estate. How can the real owner be compelled to convey the estate without payment of the purchase-money? The whole difficulty has arisen from considering the trustee as the assignee of the purchase-money as distinct from the estate, which is not his real position.

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*Ex parte*  
RABBIDGE.*In re*  
POOLEY.Judgment,  
Cotton, L.J.

THESIGER, L.J.:—

Thesiger, L.J.

I am entirely of the same opinion. If the trustee were simply an assignee of a debt due to the bankrupt—if, for instance, the property had been conveyed to the purchaser before the adjudication, but the whole of the purchase-money had not been paid, there might possibly have been some ground for the argument that payment of the unpaid purchase-money to the bankrupt after the adjudication, but without notice of it, would have been good. As to that I express no opinion. But the position of the trustee in this case is very different from that of a mere assignee of the purchase-money. He is the actual legal owner of the estate, and he is only bound to convey it away on payment of the purchase-money, and would have, after conveyance, an equitable lien on the property for any unpaid purchase-money. The bankrupt had no right to call for the money after the adjudication was made, unless the payment was one protected by the Act, or unless the payment can be considered as having been made to him in the character of an agent for the trustee. The payment is not protected by the Act, because it was made after the adjudication, and it was clearly not made to the bankrupt as agent for the trustee. The trustee had no notice of the contract for sale, and a bankrupt has no implied authority to receive money for his trustee.

C. A. The appeal was allowed, with costs.

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*Ex parte*  
RABBIDGE.

JAMES, L.J.:—

*In re*  
POOLEY.

It is much to be regretted that the advertisements of adjudications are so often postponed. These delays are a source of great mischief. It may be very hard on a debtor, who has been adjudged a bankrupt, not to stay the advertisement of the adjudication, if he has a *bonâ fide* ground for appealing; but, on the other hand, great hardship may be done to other persons if the adjudication is not advertised.

Solicitor for Trustee: *J. N. Mason*, agent for *Sankey, Son, & Flint, Canterbury*.

Solicitor for Purchaser: *J. Pettengill*.

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MOET *v.* PICKERING.

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[1876 M. 295.]

March 29.

*Trade-Mark—Infringement—Lien for Costs on the fraudulent Article—Lien of Wharfinger—Costs of Stakeholder.*

A wine merchant brought an action against another wine merchant to restrain him from pirating his trade-mark by branding it on the corks of his bottles. Some of the wine in bottles with the pirated trade-mark was in the warehouse of certain wharfingers who were made Defendants to the action. In their defence they disclaimed all interest in the matter in dispute, and submitted to act as the Court might direct upon having their charges and costs paid. At the trial they contended at the Bar that the Plaintiff, if his right was established, ought not to touch the bottles for the purpose of removing the branded corks without first paying their charges:—

*Held* (reversing the decision of *Fry, J.*), that the wharfingers had done nothing to disentitle them to their costs of the action; and that if the Plaintiff had any lien on the wine for his costs it must be postponed to the wharfingers' lien for their charges.

But, *quære*, whether the Plaintiff had any lien on the wine.

*Upmann v. Elkan* (1) questioned.

Statement.

THIS was an appeal from a judgment of Mr. Justice *Fry* (2).

The action was brought to restrain an alleged infringement of the Plaintiff's trade-mark.

(1) Law Rep. 12 Eq. 140; *Ibid.* 7 Ch. 130.

(2) 6 Ch. D. 770.

The Plaintiffs, Messrs. *Moët & Chandon*, were producers and shippers of champagne at *Epernay*, in *France*. Their wine had acquired a high reputation as *Moët & Chandon's* champagne. They were in the habit of placing on the bottom of each cork with which their wine of one particular quality was bottled a brand consisting of the letters "*M. & C.*" together with a star, and the word "*England*" was branded on the side of the cork.

The Defendant *Joseph Pickering* was the consignee of fifty cases of champagne not grown by the Plaintiffs, in bottles with corks branded with a brand similar to that of the Plaintiffs. This wine was in the possession of Messrs. *Besley & Wilson*, wharfingers in *London*, who were also made Defendants to the action. The Plaintiffs claimed an injunction, and an order that the fraudulent corks might be removed from the bottles and delivered to them.

By their statement of defence *Besley & Wilson* said that they received the champagne which was in their possession from *Pickering* in the ordinary course of business and without any knowledge that the brand on the corks was a fraudulent imitation of the Plaintiffs' brand. The statement contained the following submission:—"These Defendants submit to act in relation to the said fifty cases of champagne in every respect as this honourable Court shall direct, upon the said charges for rent or warehousing and sampling which have accrued and shall accrue due being paid or provided for, and upon their costs, charges, and expenses of this action being paid or provided for."

At the trial of the action the Defendants *Besley & Wilson* claimed a lien for their warehouse charges in priority to any claim by the Plaintiffs, and insisted that the bottles ought not to be touched for the purpose of removing the fraudulent corks until such charges were paid.

Mr. Justice *Fry* granted an injunction against all the Defendants, and an order that the wharfingers should remove the corks from the bottles in the presence of the Plaintiffs. And he made a declaration that all the Defendants should pay the Plaintiffs' costs of the action, and that the Plaintiffs were entitled to a lien for their costs on the wine in priority to the lien of *Besley & Wilson* for their warehouse charges.

From this judgment *Besley & Wilson* appealed.

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Statement.

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*Cookson, Q.C., and B. Eyre, for the Appellants :—*

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Argument.

We did not contest the claim of the Plaintiffs against *Pickering*. By our defence we submitted in the usual form to such order as the Court might direct, and claimed our warehouse charges and costs of suit. And at the hearing we contended that if the Plaintiffs had a lien on the wine for their costs, it ought to be postponed to our lien as wharfingers for warehouse expenses. There was no reason, therefore, why we should be deprived of our costs, or ordered to pay the Plaintiffs' costs: *Ponsardin v. Peto* (1).

*North, Q.C., and D. Jones, for the Plaintiffs :—*

The Judge said that he would have given the Appellants their costs if they had not opposed the claim of the Plaintiffs in the suit. They did not merely claim their costs, but they claimed a lien for their charges in priority to the Plaintiffs' lien. In fact, they refused to allow the right of the Plaintiffs to touch the corks without first satisfying their charges. They had no right to do this.

[JAMES, L.J.:—On what authority did the Judge give the Plaintiffs a lien on the wine for their costs?]

He considered that the question was decided in *Upmann v. Elkan* (2). However, the lien of the Plaintiffs is not now under appeal, and the judgment must be taken to be correct on that point. The Appellants contested it at the hearing, and were rightly ordered to pay the Plaintiffs' costs, and such costs were properly ordered to have priority to their lien.

Judgment,  
James, L.J.

JAMES, L.J.:—

I am of opinion that this order cannot be sustained. I do not think it is according to the practice of the Court, or what I may call the reasonable justice of the case, that the question whether a party is to be made to pay the costs or not is not to depend upon the facts in the case, or upon the conduct of the parties in the litigation, but upon the mode in which the counsel argue it; or that because counsel claim a little more than they are entitled to,

(1) 33 Beav. 642.

(2) Law Rep. 12 Eq. 140; Ibid. 7 Ch. 130.



that is to be made a ground for making the party they represent pay the costs. If no application had been made to the Court below, the wharfingers might well say, "You ought not even to touch the corks till you have paid our charges." Is there anything in the Defendants' conduct in the litigation to alter their rights? The Defendants in their defence say that they submit to any order which the Court should think fit to make "upon their charges and costs being paid." That is merely matter of language. Every person in this country, when engaged in litigation, must submit to what a Court of Justice orders him to do. In this case they say, "We will do what you tell us, if you do so and so." The real meaning of that is, "We do not claim anything adversely to the Plaintiffs or *Pickering*. Let the Court settle the matter between the parties who are in dispute. We have nothing to do with it. We do not raise any objection to the Court doing anything as between them it may think right." There is no suggestion in this case that the wharfingers have not acted in a perfectly *bonâ fide* manner throughout this transaction, and were not entitled to be paid the charges they made for warehousing this wine. I am of opinion that the wharfingers here had a lien upon the goods in question, and that there was nothing to deprive them as wharfingers of their lien because the corks in these bottles of champagne had fraudulent marks which they knew nothing at all about. I think they have done nothing to deprive themselves of their right to the costs of the action, and this lien for wharfingers' charges must be considered prior to any lien which the Plaintiffs may have for costs.

The question whether the Plaintiffs are entitled to a lien is not now before us, but it must not be supposed that I assent to the decision in the case that has been referred to, *Upmann v. Elkân* (1), where it was held that the Plaintiff in such a case had a lien for his costs upon the goods that had been warehoused. That seems to me to be something quite new. In the present case I am of opinion that the wharfingers ought to have their costs in the suit, and that they are entitled to a prior lien for their warehouse charges. The order of Mr. Justice *Fry*, therefore, will be varied by omitting the declaration that the Plaintiffs have priority with respect to their

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Judgment,  
James, L.J.(1) Law Rep. 12 Eq. 140; *Ibid.* 7 Ch. 130.

C. A. costs of suit over the Defendants, the Messrs. *Besley*, for warehouse charges, and that the Plaintiffs pay the Defendants *Besley's* costs in the Court below and in this Court.

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Judgment,  
Cotton, L.J.

COTTON, L.J. :—

I am also of opinion that so much of this order as has been referred to by Lord Justice *James* cannot be sustained. In the first place, Mr. Justice *Fry* has declared that this claim of the Plaintiffs for their costs has priority over a lien which the wharfingers claim for rent and wharfingers' expenses—that is to say, a lien upon the bottles after they have become entirely innocent by the fraudulent corks being removed. That cannot be sustained. The lien of the wharfingers is, I assume, only as against the bottles and wine when the fraudulent corks have been removed, but I cannot see any possible ground, when those have been removed, for saying that their lien for warehouse expenses loses any priority that it before had, and which was a first charge against these goods. It must not be supposed that I assent to the view taken in the case that has been referred to in the course of the argument, where it was held that the Plaintiff had a lien for his costs upon the goods; but we cannot decide that question now.

The other question is whether Mr. Justice *Fry* was right in making the wharfingers pay the Plaintiffs' costs. The wharfingers do not make common cause with the wrongdoers, they do not assist them in any way, and when they are made parties to the suit all they say is, "We are ready to act in relation to the cases of champagne in such manner as the Court shall direct, subject to the payment of our charges." It has been suggested that the wharfingers ought to lose their costs, because they contended at the Bar that the corks ought not to have been removed or interfered with at all till their charges had been provided for. In my opinion that is not sufficient to justify our making an order that they should pay the Plaintiffs' costs of the suit. Therefore that part of the order cannot be sustained, and I agree with Lord Justice *James* that the ordinary order in such cases must be made, that the wharfingers are entitled to the costs of the suit, they having on the pleadings submitted to act as the Court should direct.

THESIGER, L.J.:—

I am of the same opinion. I think there is no ground for depriving the wharfingers of their costs, or for postponing the lien they had obtained on these goods. I entirely concur with the Court in the doubts expressed as to there being any right to give the Plaintiffs a lien at all upon these particular goods. It is not necessary to decide that matter in this case, but it certainly seems to me that there ought to be no such lien. I am clearly of opinion that the claim of the Plaintiffs in this case ought to be postponed to the right of the wharfingers. The only ground upon which it has been asked that their right should be postponed is that expenses had been incurred by the action they had taken. They did only that which it was necessary they should do under the circumstances, and they made their submission to the Court, and, having done that, it is said that they are not only to lose their lien, but also to be made to pay the costs of this suit. I must own that I can see no ground in principle, and none upon authority, for saying that that is right.

Solicitors: *Nicol, Sons, & Jones; Arkcoll, Jones, & Cockell.*

*Ex parte* DICKIN. *In re* POLLARD.

*Court of Bankruptcy—Jurisdiction—Debtor to Bankrupt's Estate—"Property"—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 4, 65, 66, 72, 98—Principal and Factor—Principal's Bills accepted by Factor—Bankruptcy of Principal—Sale of Goods by Factor to meet Acceptances—Bankruptcy of Factor before Payment of Acceptances—Right of Principal's Trustee to Proceeds of Sale.*

The Court of Bankruptcy, even if it possesses jurisdiction under sect. 72 of the *Bankruptcy Act*, 1869, to enforce a simple money demand by the trustee of a bankrupt's property against a third party (as to which *quære*), ought not to exercise the jurisdiction, but ought to leave the demand to be enforced by the trustee in an action in the ordinary way.

Commission agents accepted bills drawn upon them by their principals for part of the value of goods consigned to the agents for sale. After the principals had filed a liquidation petition the agents sold the goods in order to reimburse themselves the amount of one of the bills which they had paid, and

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Judgment,  
Thesiger, L.J.

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C. J. B.

March 11.

C. A.

May 16.

C. A.

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Ex parte  
DICKIN.In re  
POLLARD.

to provide funds to meet the others which were soon to become due. Before the latter bills were paid the agents filed a liquidation petition. They had spent all the proceeds of the sale. Their creditors agreed to accept a composition, which was paid to the holders of the bills, some of whom claimed to prove in the liquidation of the principals. The principals' trustee applied to a County Court in Bankruptcy for an order that the agents should pay to him the balance of the proceeds of sale, after deducting the amount of the bill which they had paid in full, and the composition which they had paid in respect of the others:—

*Held*, by the Chief Judge (reversing the decision of the County Court Judge), that the trustee was not entitled to the order.

*Held*, by the Court of Appeal, that the trustee's demand against the agents was a mere demand for a debt due to the principals' estate, and that the Court of Bankruptcy ought not to assume jurisdiction to try it.

Statement.

JOSHUA POLLARD, SON, & Co. were stuff merchants at Bradford. In the year 1876 they entered into an arrangement with Murrell & Crisfield, commission agents in London, that they should consign goods to Murrell & Crisfield for sale. Murrell & Crisfield were to make advances to Pollard & Co. upon the security of the goods, by accepting bills drawn upon them by Pollard & Co. Murrell & Crisfield were to receive 2 per cent. commission on all sales, and 5 per cent. interest on their advances. If when the acceptances became due the proceeds of the sales of goods already made were not sufficient to meet the acceptances, Pollard & Co. were to provide funds for the purpose, and, if they failed to do so, Murrell & Crisfield were to be entitled to sell the goods in their hands in order to put them in funds to meet the acceptances. The bills were not drawn against any specific goods.

In March, 1877, goods of the invoiced value of £2571 13s. 7d. had been consigned by Pollard & Co. to Murrell & Crisfield, and the latter had accepted four bills drawn upon them by Pollard & Co., viz., a bill for £720, due on the 28th of March; a bill for £400, due on the 15th of April; a bill for £300, due on the 19th of April; and a bill for £750, due on the 17th of May, making £2170. On the 28th of March Murrell & Crisfield paid the bill for £720. They had then sold a part of the goods for £271 1s. 6d., and they had no other moneys of Pollard & Co. in their hands. On the 3rd of April they wrote to Pollard & Co., requesting them to provide funds to pay the £720 bill and to meet the other bills which were about to fall due, and saying that, if this was not done,



they should sell the remaining goods at once for the best price which they could obtain. *Pollard & Co.* had, on the 28th of March, filed a liquidation petition in the *Bradford* County Court, under which *Henry Dickin* had been appointed receiver of their property. He replied to the letter of *Murrell & Crisfield*, informing them of the filing of the petition. They proceeded, notwithstanding the objection of *Dickin*, to sell the remainder of the goods by tender, and they received the proceeds of the sale in two sums, viz., £417 0s. 1d. on the 9th of April, and £1147 8s. 2d. on the 11th of April. These sums they paid into their bankers to the credit of their current account, together with other moneys of their own. On the 15th of April the bill for £400 became due, but *Murrell & Crisfield* did not pay it. On that day they filed a liquidation petition. The balance then standing to their credit at their bankers was only £36 12s. 7d.

The creditors of *Pollard & Co.* resolved that their affairs should be liquidated by arrangement, and appointed *Dickin* trustee. The creditors of *Murrell & Crisfield* resolved to accept a composition of 7s. in the pound. The trustee of *Pollard & Co.* was not a party to the composition proceedings, and was not bound by them. The composition was received by the holders of the three bills for £400, £300, and £750. The holders of those three bills, or at any rate some of them, proved against the estate of *Pollard & Co.* The trustee of *Pollard & Co.* applied to the County Court for an order declaring that he was entitled to the goods, or to the proceeds of their sale, less the amount of the bill for £720, and the amount of the composition paid by *Murrell & Crisfield* upon the other bills, and directing them to pay the balance which should be found due from them upon that footing.

The Judge (Mr. *Daniel*, Q.C.) held that it was the duty of *Murrell & Crisfield*, as agents, to have retained the balance of the sale moneys in their hands, and to have applied the same in payment of the bills due and coming due. He further said: "The Respondents (*Murrell & Crisfield*) had no right to apply the money received from the sale of the debtors' goods as their own moneys. In doing so they were guilty of a breach of trust; whether criminal or not, it was certainly fraudulent. They have been

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able, by this improper use of their principals' money, to pay their own creditors, and to a considerable extent. This money in their hands was trust money, and has been misapplied by them, and they must be held answerable for its misapplication. They are liable to be debited with all the moneys they received, and to be credited only with the money they have actually paid." [His Honour then stated the account, resulting in a balance of £593 4s. 2d., and continued:—] "This sum of £593 4s. 2d. is the balance of the money of the debtors which ought now to be in the hands of the Respondents (*Murrell & Crisfield*), and held by them as agents in a fiduciary character. And I order that this sum be paid by the Respondents to the trustee on or before the 1st of March next."

His Honour also ordered *Murrell & Crisfield* to pay the costs of the motion.

From this order *Murrell & Crisfield* appealed to the Chief Judge. The appeal was heard on the 11th of March, 1878.

Argument.

*Winslow*, Q.C., and *Arnold Morley*, for the Appellants:—

The order of the Court below appears to have been made on the authority of the 15th section (1) of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62). But that section applies only to cases of fraud, which is not alleged here otherwise than by implication, and, even so far as alleged, cannot be sustained. *Murrell & Co.* were factors; there was no obligation on them to earmark this money. If a factor may sell, he has a right to keep the money. *Murrell & Co.* were not trustees; there has been no breach of trust.

*Pollards'* trustee cannot be in a better position than he would have been if the goods had remained unsold.

*Murrell & Crisfield*, by giving their acceptances, have paid for the goods. Their debt to *Pollards* has been discharged by payment

(1) Sect. 15: "Where a debtor makes any arrangement or composition with his creditors under the provisions of the *Bankruptcy Act*, 1869, he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of

the arrangement or composition he obtained forbearance by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends."

of the 7s. composition. There are not two debts; and there cannot be a double proof for one debt.

*Roxburgh*, Q.C., and *Finlay Knight*, for the trustee of *Pollards'* estate:—

At the time of this sale, *Murrell & Co.* having £271 1s. 6d. of *Pollards'* money in their hands, the other acceptances not being due, proceeded, on the 9th and 11th of April, to sell goods which were consigned to them, to meet bills not due till some time afterwards. They thus got about £1550 into their possession, all of which, except a fraction, they drew out before the 15th of April, and then stopped payment. In other words, out of *Pollards'* goods they made for themselves a fund, out of which they paid their other creditors. Was not this fraud?

It was the duty of *Murrell & Co.* to keep these sale moneys apart: *Clarke v. Tipping* (1).

[BACON, C.J.:—The “property” there spoken of means goods in a warehouse.]

The principle is equally applicable to the money which represents a particular property.

The money has been ours throughout; but they gave us no notice, and did not even enter our names in their statement of affairs.

BACON, C.J.:—

No doubt this case is one of considerable complication in the various ways in which it has been presented to the Court, but in principle I do not think there is much difficulty in it. First of all, I will dispose of the suggestion that it is a case which comes within the *Debtors Act*. I am surprised that a gentleman engaged in commercial cases in the city of *London* should rely upon such a doctrine as, in the words of Lord *Langdale*, it is difficult to understand, viz., that a factor should keep the property of his principal, or the proceeds of the property of his principal, separate from his own. How can a man carry on the business of a factor if he does not sell the goods of his principal and place the proceeds

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in a place of security? It is his money; he becomes a debtor to his principal, and he discharges the duty of a factor. That is what was done in this case. The principal sent goods to him to be sold, and he sold them and received the money. Is that a moral fraud, or anything like the fraud that is pointed at in the statute? It cannot be said to exist in this case. In the course of these transactions, at the time he received the goods, he became the agent acting for the benefit of his principal, in the shape of acceptor of bills of exchange, which go out to the world, and for which he is liable. Then he fails, and proposes a composition, and these bills are held by his creditors. They come in, some of them, and take what they can get of the composition, and they give up the bills, and for so much the debts that he owes are discharged. That he has only paid 7s. in the pound has nothing to do with it. He was a surety, and on his suretyship he owes no longer the £2170 on the bills as a factor. It is said that he has only paid 7s. in the pound, and that there are still 13s. in the pound more to pay. How can that come against the debtor's estate? The debtor's estate is freed by the composition. There cannot be two proofs against that estate. You cannot get back an amount which has been paid. It was urged with a certain amount of plausibility, which I own at first sight struck me, that if only 7s. in the pound had been paid, 13s. in the pound still remained due, and the difference was rightly due to Messrs. *Pollard*, as the principals. But when I consider that if Messrs. *Pollard* had remained perfectly solvent, and had taken up these bills and had brought them in a charge against this debtor's estate, they could not have proved for them, because payment had already been made for them, and bills which are proved once are proved against the estate against which they are proved for ever, and there is an end of them. And so in reference to a debt which once proved is satisfied; and therefore there is no doubt whatever that it is a mere matter of account, and the account having been properly taken, it is proved against the estate, and the result is, that if Messrs. *Pollard* have any debt to prove they can prove it, but in regard to the bills of exchange, they have already been proved and are gone.

I think the order is wrong, and that there is no claim on the part of Messrs. *Pollard's* trustee against Messrs. *Murrell & Crisfield*.



*Winslow* asked that the order might be discharged with costs.

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BACON, C.J. :—

The order of the County Court will be discharged, including the direction as to costs, but I give no costs of the appeal.

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From this decision the trustee of *Pollard & Co.* appealed. The appeal was heard on the 16th of May, 1878.

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*Roxburgh*, Q.C., and *Finlay Knight*, for the Appellant :—

Argument.

It may be a question whether the sale of the goods was made *bonâ fide*, but at any rate *Murrell & Crisfield* had no right to mix the proceeds of the goods with their own moneys, and to employ them as they did in paying their other creditors, leaving the bills on which *Pollard & Co.* were liable unpaid.

[JAMES, L.J. :—The money was not earmarked, and it had been all drawn out of the bank before the petition was filed by *Murrell & Crisfield*: *Clayton's Case* (1).]

We do not claim the specific money, but *Pollard & Co.*'s trustee not being bound by the composition has a right to call on *Murrell & Crisfield* to pay him the price of the goods, less what they have paid in respect of the bills.

[JESSEL, M.R. :—*Murrell & Crisfield* were mere debtors to *Pollard & Co.*'s estate, and an action might have been brought against them. What jurisdiction has the Court of Bankruptcy in such a case?]

The Judge of the County Court considered that the goods and the proceeds of their sale were impressed with a trust.

[JAMES, L.J., referred to *Ex parte Cooke* (2).]

*Murrell & Crisfield* were only entitled to be indemnified against liability on the bills out of the proceeds of the goods, and their liability is gone by reason of the composition. If they had not filed a petition, and had made a contract with the bill-holders to pay them only 7s. in the pound, *Pollard & Co.* would have been entitled to have the goods returned to them, subject to the payment of that 7s.

(1) 1 Mer. 572.

(2) 4 Ch. D. 123.

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[JESSEL, M.R.:—On the principle of *Ex parte Waring* (1) and *Powles v. Hargreaves* (2), the bill-holders might have been entitled to be paid the balance of 13s. in the pound out of the proceeds of sale. But the goods are gone, and the proceeds of sale are gone, and nothing remains but a right of action for debt against *Murrell & Crisfield*. What jurisdiction has the Court of Bankruptcy in such a case?]

Sect. 72 of the *Bankruptcy Act*, 1869, gives the Courts of Bankruptcy power to decide "all questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide, for the purpose of doing complete justice or making a complete distribution of property in any such case;" and by sect. 4, "property" is defined as including "money, goods, things in action, land, and every description of property, whether real or personal; also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined." And by sects. 65 and 66 the Courts of Bankruptcy have, for the purposes of the Act, all the powers and jurisdiction of a Judge of the Court of Chancery as well as of the superior Courts of Law. The order asked for in this case was for the purpose of realizing a part of *Pollard & Co.*'s estate.

[JAMES, L.J.:—Sect. 98 provides that, if any person, on examination before the Court, admits that he is indebted to the bankrupt, the Court may, on the application of the trustee, order him to pay to the trustee the amount admitted. This provision would have been unnecessary if your construction of sect. 72 is right.]

Sect. 98 gives an additional power of making a summary order for payment where the debt is admitted. The extent of the jurisdiction of the Court of Bankruptcy is illustrated by *Ex parte Anderson* (3); *Morley v. White* (4); *Halliday v. Harris* (5); *Ex parte Cohen* (6); *Ex parte Gillebrand* (7).

(1) 19 Ves. 345.

(2) 3 D. M. & G. 430.

(3) Law Rep. 5 Ch. 473.

(4) Law Rep. 8 Ch. 214.

(5) Ibid. 9 C. P. 668.

(6) Ibid. 7 Ch. 20.

(7) Law Rep. 10 Ch. 52.

[JESSEL, M.R., referred to *Ellis v. Silber* (1).

*Winslow*, Q.C., referred to *White v. Simmons* (2); *Bankruptcy Act*, 1869, s. 12.]

Those cases only shew that the jurisdiction of the Court of Bankruptcy is not exclusive.

[JESSEL, M.R.:—Your argument must go to this extent, that, if a man, who claimed a landed estate of which he was not in possession, became a bankrupt, the Court of Bankruptcy could try an action to recover the land.]

No doubt we must go to that extent. It is the duty of the Court of Bankruptcy to realize all the property of the bankrupt and distribute it among his creditors.

*Winslow*, Q.C., and *Arnold Morley*, for *Murrell & Crisfield*, were not heard.

JESSEL, M.R.:—

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Jessel, M.R.

The substance of the case is this. Goods, the property of *Pollard & Co.*, were sent by them to *Murrell & Crisfield* for sale, under an arrangement by virtue of which the goods were in effect made a security to *Murrell & Crisfield* for the payment of bills of exchange which they accepted for the accommodation of *Pollard & Co.* After *Pollard & Co.* had filed their liquidation petition *Murrell & Crisfield* sold the goods, for the purpose of repaying themselves the amount of one of the bills which they had already paid, and of providing themselves with funds to meet the other bills which were soon to become due. It has been suggested that the sale was not made *bonâ fide*, but in fraud, and with a view to the proximate failure of *Murrell & Crisfield*, which took place very soon after, and under which they have paid their creditors a composition of 7s. in the pound. It appears that the holders of the last three bills are unpaid, except to the extent of the 7s. composition, and that some of them have proved in the liquidation of *Pollard & Co.* Under these circumstances one question which arises, and which will have to be decided somewhere, is whether the money provided by the sale of the goods has become applicable

(1) Law Rep. 8 Ch, 83.

(2) Law Rep. 6 Ch, 555.

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to the payment of the bills, and whether, therefore, the trustee of *Pollard & Co.* could under any circumstances have any claim to it. Another question is, whether *Murrell & Crisfield* did or did not sell the goods *bonâ fide*. We have not at present the materials for determining that question, for we have nothing before us but the dates of the different transactions. Moreover, the whole of the proceeds of the sale had been disposed of by *Murrell & Crisfield* before they filed their petition. This being so, it is clear that the demand of *Pollard & Co.*'s trustee against *Murrell & Crisfield* for the proceeds of the sale is a demand of a debt. The property in the goods is not in him. The goods are no longer in existence as the goods of *Pollard & Co.* The proceeds of the sale are gone too; they were not earmarked in any way, and at the most the trustee's demand against *Murrell & Crisfield* is a demand for a debt equal to the amount produced by the sale, less what they have paid to the bill-holders. The very serious question, therefore, arises, whether the Court of Bankruptcy has any jurisdiction to make an order for the payment of such a demand. It appears to me, however, that it is not necessary for us to decide this question now, for, if the jurisdiction exists, there is the further question whether it is expedient to exercise it in the present case. It never could, I think, have been the intention of the Legislature that the Court of Bankruptcy should exercise a jurisdiction to decide the title to any real estate in the country which was claimed by a man who happened to be a bankrupt, for it must be remembered that the decision of the Court of Appeal in Bankruptcy cannot be appealed from to the House of Lords except with the leave of the Court. But, assuming that the Court of Bankruptcy has jurisdiction, I can see no reason why in the present case an action should not be brought by the trustee against *Murrell & Crisfield* for the debt. No question of bankruptcy law is involved, whereas a question of character is involved, which the parties might not desire to have decided in a County Court. There are also some difficult questions of law, such as the application of the doctrine of *Ex parte Waring* (1)—a doctrine the application of which is not easily understood. I can see no ground for the Court of Bankruptcy assuming jurisdiction in this case. I may

(1) 19 Ves. 345.



go further and say that whenever there is a simple money demand by the trustee of a bankrupt's property, which is capable of being tried by the ordinary tribunals, I can see no reason why the Court of Bankruptcy should assume jurisdiction to try it.

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JAMES, L.J.:—

I am of the same opinion. If the doctrine of *Ex parte Waring* (1) really applies to the proceeds of sale of these goods, that might be a reason for trying the question in the Court of Bankruptcy. But for that purpose it would be necessary that the bill-holders should be before the Court, and they are not here. If *Ex parte Waring* does not apply, then the claim of the trustee is, as the Master of the Rolls has said, a mere common money demand. The Court of Appeal has given a very extended application to sect. 72 of the Act. But it appears to me that the Legislature introduced into that section the words "which the Court may think it expedient or necessary to decide," because they thought they could trust the Court of Bankruptcy not to exercise the jurisdiction unless it really was expedient to withdraw the case from the ordinary tribunals. It is not expedient to do that in the case of a mere money demand.

BRAMWELL, L.J.:—I agree.

The appeal was dismissed with costs.

Solicitors for Appellant: *Paterson, Snow, & Bloxam*, agents for *Gardiner & Jeffery, Bradford*.

Solicitors for Respondents: *Phelps, Sidgwick, & Biddle*.

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*In re* ENGLEFIELD COLLIERY COMPANY.*Winding-up—Directors—Companies Act, 1862, s. 165—Misapplication of Funds of the Company.*

*E.* agreed with *S.* that *S.* should get up a company to purchase and work a colliery which *E.* had power to sell; that *S.* should sell to the company for a certain price in cash and shares, and that the balance, after paying preliminary expenses, should be equally divided. *S.* promoted the formation of a company to purchase the colliery for £25,000 in cash and £25,000 in paid-up shares, and induced six gentlemen to become directors, engaging that they should be at no expense. The articles contained a clause empowering, but not binding, the directors to pay the preliminary expenses attending the formation of the company. Shortly before the company was registered an agreement was made between *S.* and the directors that *S.* should receive £3500 for preliminary expenses. On this occasion he produced a list of preliminary expenses, but did not produce vouchers, and no inquiry was made of him as to whether he was entitled to receive anything under his arrangements with *E.* *S.* received £3200 from *E.*, and received out of the funds of the company the £3500, out of which he paid the calls on the shares which the directors had taken to qualify them for the office. The company having been ordered to be wound up:—

*Held*, by *Malins*, V.C., that the directors were jointly and severally liable to repay to the company the sum so ordered to be paid to *S.* for preliminary expenses, on the ground that the money was paid in order to provide the directors' qualifications.

*Held*, on appeal, that this decision must be affirmed, for that the directors had by their agreement with *S.* disqualified themselves for exercising a discretion as to the payment of preliminary expenses, and had not used due care and caution in examining into the propriety of paying them, and that, irrespective of the fact of their calls having been paid out of the money received by *S.*, the payment to him was, under the circumstances, a misapplication of the funds of the company, for which they were liable under the *Companies Act*, 1862, s. 165.

Statement.

THIS was an adjourned summons on which the Court was asked on behalf of the official liquidator of the *Englefield Colliery Company, Limited*, to declare that the directors of the company, Lord Richard Browne, Mr. Campbell, Lieutenant-Colonel Hamilton, Mr. Albert Pelly, Mr. Sapte, and Mr. Wingrove, were jointly and severally liable to repay to the company the sum of £3500 which they had paid to Mr. Sheridan, the promoter of the company, for preliminary expenses, and which was retained or applied by him for purposes other than preliminary expenses properly payable;

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and also that the directors might be ordered to pay the amount of the shares held by them as their qualification for the office. Pending the proceedings Lord *R. Browne* paid £500 by way of compromise of the demand for £3500, and the summons was amended by omitting his name and reducing the £3500 claimed to £3000.

The company was registered on the 19th of March, 1873, as a limited company, for the purpose of purchasing and working the *Englefield Colliery*, under a memorandum and articles dated the 15th of March, 1873, with a capital of £100,000 in 10,000 shares of £10 each, of which 2500 were to be issued as fully paid up; and it was formed under the following circumstances:—

In 1872 a person named *Edwards* entered into an arrangement with *Jones*, the owner of the colliery, that *Edwards* should get up a company to purchase it, that *Jones* should receive £4500 in cash and £11,000 in paid-up shares, and that *Edwards* should have whatever else he could make out of the transaction. *Edwards* in 1873 entered into an arrangement with *Sheridan* that *Sheridan* should get up a company to purchase the colliery for £25,000 in cash and £25,000 in fully paid-up shares, that *Sheridan* should pay all expenses up to allotment, and that the surplus should be equally divided between him and *Edwards*.

*Sheridan* accordingly took steps to start the company, and obtained the consent of the above-named persons to act as directors. It appeared that in each case he undertook that the director should be at no expense. A contract was entered into on the 14th of March, 1873, by *Jones* and *Edwards* with a trustee for the intended company for the sale of the colliery to the company for £25,000 in cash and £25,000 in paid-up shares, to be paid as follows: £12,500 in cash within fourteen days after the allotment of the shares in the company, and the remaining £12,500 in cash and £25,000 shares within six weeks after the allotment of the shares. This contract was adopted by the articles of association, and the above-named directors were named in the articles as the first directors, along with another gentleman, who immediately resigned and need not be further noticed.

By clause 81 of the articles it was provided that the directors might, without any further power or authority from the members, immediately on the incorporation of the company, and notwith-

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standing that the nominal capital might have been only partially subscribed for, commence business and do the things therein mentioned in the name and behalf of the company: (a) "They may and are hereby authorized and empowered to pay and reimburse themselves out of the capital of the company or any other moneys of the company in their hands all printing, legal, and other expenses whatsoever incurred in the formation of the company; also they may pay brokers and others a commission for raising the capital or placing the shares of the company."

The qualification of a director was the holding fifty shares.

It appeared that before the company had been registered an arrangement had been made between the proposed directors and *Sheridan*, that upon allotment £3500 should be paid to him, as expressed in a letter of the 13th of March, 1873, from him to the chairman, "for my risk and outlay in this matter as preliminary expenses." On the 18th of March he wrote a letter to the chairman, undertaking that in the event of there being no allotment of the shares of the company he would defray all the expenses in connection with the formation of the company and hold the directors harmless in respect of the same. There was no entry of these arrangements in any of the books of the company.

The first meeting of the directors was held on the 9th of April, 1873, at which it was reported that 1563 shares had been applied for, and the deposit of £1 per share paid, except on 300 of them. At this meeting the six directors proceeded to allot the shares applied for, including fifty shares to each of themselves. These directors' shares were the shares on which no deposit had been paid. *Pelly* paid his deposit on the 5th of May, but nothing was paid on any other of these 300 shares till June.

At a board meeting on the 5th of May, 1873, it was resolved that a cheque for £1200 should be drawn in favour of *Sheridan* on account of preliminary expenses, and such cheque was drawn and paid at the beginning of June, immediately after which the sums payable on allotment were paid in respect of the shares of several of the directors. On the 11th of July, 1873, another board meeting was held, at which a further cheque for £800 was drawn in favour of *Sheridan* for preliminary expenses, and £600 of this was traced as having been applied in payment of £2 per



share which had become due from the directors for a call on their shares. At a board meeting held on the 23rd of July, 1873, a call of £2 per share was made payable on the 26th of August. The directors paid nothing in respect of it till after a meeting on the 1st of October, when a further sum of £600 was ordered to be paid to *Sheridan* for preliminary expenses, and certain sums for remuneration to the directors, and at different times after this the £2 per share on the directors' shares was paid. On the 29th of October, 1873, a further sum of £600 was ordered to be paid to *Sheridan*, and a further call of £2 per share was made. This call was paid on the shares of five of the directors on the day on which the cheque for *Sheridan's* £600 was cashed. Mr. *Sapte's* call was paid some days later. On the 21st of January, 1874, a final call of £1 per share was made payable on the 19th of February. On the 4th of March *Sheridan* received a cheque for £300, the balance of the £3500. On the 1st of April six cheques were drawn for directors' fees for sums amounting together to £350, and on subsequent days in April the final call of £1 on the directors' shares was paid.

*Sheridan* deposed that the preliminary expenses paid by him considerably exceeded the £3500 which he received. He stated in his examination that he had paid out of the moneys so received by him the moneys requisite to pay up the shares taken by the directors, except as regarded *Sapte*, who had paid £150. It appeared that at the discussions relating to the amount to be allowed to *Sheridan* for preliminary expenses he had produced a list of items of expenditure, including a fee of £1000 to the brokers of the company for allowing their names to appear on the prospectus; about £1700 for the estimated costs of advertising and printing the prospectus and circulars; about £200 for law charges and registration; and about £500 for office rent and clerk's salary up to the formation of the company. Vouchers were not produced, but *Sheridan* produced letters from the tradesmen employed, stating that they had no claim against the company. It did not appear that any inquiry was made of *Sheridan* as to whether he would be entitled to receive anything in respect of the formation of the company under his arrangements with *Edwards*.

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*Edwards*, who was examined on behalf of the official liquidator, deposed that the cash payment to be made by the company was altered from £25,000 to £8500, and the share payment increased to £41,500. That he had received the £8500, out of which he had paid to *Sheridan*, or by his direction, £3250, and that he had not settled accounts with *Sheridan*, but considered that he did not owe him anything more.

On the 12th of February, 1875, an order was made for winding up the company on the application of a creditor.

It appeared that *Sheridan* had promised to give *Wingrove* £500 if he could induce Lord *Richard Browne* to become a director and chairman of the company. *Wingrove* had applied to Lord *Richard Browne* and persuaded him to take those offices, and alleged that he had thus a legal demand against *Sheridan*, and that *Sheridan* had paid the £500 on *Wingrove's* shares in satisfaction of that demand.

The official liquidator, on the 25th of October, 1876, took out a summons to the effect stated above. Lord *Richard Browne*, by way of compromise, paid £500 in satisfaction of his liability, with the sanction of the Judge, and the summons being amended, as above stated, was brought on against the other five directors.

The summons was heard before Vice-Chancellor *Malins* on the 21st and 28th of July, 1877.

Argument.  

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*Higgins*, Q.C., and *Beale*, for the official liquidator:—

It was first settled in the case of *In re Disderi & Co.* (1) that it was not lawful for directors to have their qualification shares paid for them by the promoter out of the funds of the company. That case has been followed by several others, and there is no doubt that these directors are liable to repay the sums they so received. The money was paid to *Sheridan* nominally for preliminary expenses, but it has been traced into the hands of the directors, who made no payment upon their shares until they received the amount from *Sheridan*. It is proved that the directors knew where the money came from, and as directors they cannot plead ignorance of the transaction. They were in the position of trustees for the company, and they cannot be allowed to make a profit out of a

(1) Law Rep. 11 Eq. 242.

transaction which, as such trustees, they ought to have prevented. This was laid down in *Ex parte Larking* (1), and the same principle was acted upon in *Madrid Bank v. Pelly* (2), and has been the guiding rule in many other cases, including the *Brighton Brewery Company* (3).

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*Whitehorne*, for *Wingrove* :—

It is shewn that the £3500 was paid to *Sheridan* for preliminary expenses in forming and promoting the company. If so, why should he not have been at liberty to pay for the qualification of the directors, if he thought such a payment desirable. It was, in fact, his own money, and not the company's, and he could do as he liked with it. As to the payment to *Wingrove*, there was a *bonâ fide* debt due to him by *Sheridan* for introducing Lord *Richard Browne* to act as chairman. That was the consideration for the payment. Under any circumstances there is no joint and several liability on these directors. In the *Madrid Bank v. Pelly* each of the directors was made liable for the sum he had received, and this was also the case of *In re Brighton Brewery Company*.

*A. Young*, for *Sapte* :—

Mr. *Sapte* did not receive the whole amount, £500, for his shares. He himself paid £150, and is willing to pay the rest if he has time allowed him, but there is no ground for declaring a joint and several liability against the directors.

*Crossley*, for *Campbell* :—

There was a *bonâ fide* agreement by the company to pay *Sheridan* the £3500 for a good consideration, which they have had the benefit of; and he having paid the directors with what was in fact his own money, we ought not to be called upon to pay over again the money for our shares. If the official liquidator cannot get the money from *Sheridan*, he cannot get it from the directors.

*Higgins*, in reply as to joint and several liability, cited *De*

(1) 4 Ch. D. 566.

(2) Law Rep. 7 Eq. 442.

(3) 37 L. J. (Ch.) 278.

C. A. *Ruvigne's Case* (1) and *London and Provincial Starch Company*,  
1877-8 before Vice-Chancellor *James*, April 22, 1869.

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MALINS, V.C. :—

This is a very remarkable case. The company was registered on the 19th of March, 1873, with a capital of £100,000, in 10,000 shares of £10 each. If the colliery purchased by the company had been properly managed there is nothing to shew that it would not have produced good results, and I see no reason to suppose it was not a *bonâ fide* concern. But it was attempted to be carried into effect in a most improper manner. This is one of the many instances which have lately come before the Court in which persons have proceeded to work out a project with too small a capital. The company was advertised with a capital of £100,000, holding out therefore to the public that it would require that amount of capital to work it, instead of which they commence their operations when they had less than a sixth of their capital subscribed for. It is said that there were fraudulent proceedings at the outset in purchasing the colliery at one price and selling it to the company at a much larger price ; but with that I am not concerned upon the present application. The company having been formed, the first meeting took place on the 9th of April, 1873, and at that meeting the secretary reported that applications had been made for 1563 shares, including 300 for the six directors of the company, which 300 were not accompanied with deposits at that time ; therefore the 300 shares were not paid for, and the whole amount subscribed for amounted to less than a sixth of the whole capital. If directors will go on attempting to carry out with £15,000 that which they have said could not be worked without £100,000, no wonder they get into trouble. Such conduct is an entire neglect of their duty. At that meeting in April the directors ought to have said, We cannot go on without more capital, and they should have returned to the shareholders all the deposits which had been paid ; instead of which they have had recourse to a practice which it is to be hoped they will remember as long as they live. It seems to have been arranged between the company and *Sheridan* that the latter was to have  $3\frac{1}{2}$  per cent. upon the amount of



capital; but what can be said of the conduct of directors who, finding they had only 1563 shares taken up, would pay to the promoter the whole sum of £3500 for preliminary expenses, which was to be the amount paid upon the whole capital of the company? The cause of their conduct is evident: all these directors had sat at the board, and they all knew it was impossible for them to escape their liability to pay £500 each for the fifty shares they were bound to hold as a qualification. Every one of them having incurred that liability, their scheme was to escape from the liability by making the funds of the company pay the money. Then they resolved that out of the funds they had in hand they would pay Mr. *Sheridan* £3500 for what they call preliminary expenses, and with this money of the shareholders *Sheridan* was to pay what was required for the shares necessary for their qualification. Is that scheme consistent with honesty? Was it not paying the qualification of the directors out of the money of the shareholders? *Sheridan* says, "It is true that I had an arrangement with *Sapte* that he was not to pay the money for his qualification, and that I had an arrangement with *Campbell* to the same effect, but *Campbell* had no legal claim on me. It is true that I did qualify *Campbell*, and to do this I procured the money from the company by way of preliminary expenses. I qualified the directors, and they knew where the money came from." None of these directors have denied that they received their qualification from *Sheridan*, except *Campbell*, who has appeared by his counsel, Mr. *Crossley*, who has argued upon the allegation that *Campbell* paid the money himself; but *Campbell*, in his affidavit, has stated that *Sheridan* promised it should cost him nothing, and it did cost him nothing. He understood that *Sheridan* would pay his qualification, and he believed that *Sheridan* considered himself in *Campbell's* debt in respect of some previous transaction. He then says that *Sheridan* paid him before he paid his calls upon the shares.

Now, what is the position of these gentlemen? It was their duty as trustees to take care of the money and to protect the interests of the shareholders, instead of which they entered into this discreditable arrangement with *Sheridan*. Not one of them ever paid a penny. After having paid the money to *Sheridan* by way of preliminary expenses, it is paid back to them to relieve

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them from their liability. Under such circumstances, what is the law?

In *De Ruigné's Case* (1), Lord Justice *James* said, "The Appellant allows himself to become the paid agent of *Hunt* for the purpose of assisting him in his transactions with the company. *Hunt* said to this gentleman, 'I will name you and qualify you as a director. You shall be on the board as my nominee. I will give you your qualification, and the first thing you have to do is to carry out that agreement with me.'" And his Lordship added, "It is impossible to say that the thing is not as gross misconduct as any man in the position of a director could be guilty of."

That case is exactly the same as *Hay's Case* (2), which was decided under the 165th section of the *Companies Act*, 1862. There cheques were drawn by the directors on the bankers of the company, and given to the vendors in payment of the purchase-money, and one of the cheques found its way into Sir *J. Hay's* bankers, and Sir *J. Hay* gave a cheque for the same amount to the company in payment for his shares.

Then there is one of the last cases decided, that of *In re Eupion Gas Company* (before myself on the 17th of March, 1877, and afterwards before the Court of Appeal on the 9th of June, 1877), where *Aspinall* was the holder of shares the money for which had been paid, but it was money borrowed of a banker, which was to be paid back again. It was a mere trick; so here the shareholders paid the money, and the directors got that money and paid it to *Sheridan*, who repaid it to them. The payment by way of preliminary expenses was merely colourable. It is a clear misfeasance on the part of the directors, and a gross breach of trust by them, and those who are guilty of such conduct are answerable jointly and severally to repay the money. They are all liable for the whole amount of £3500.

It appears that one of the directors, Lord *Richard Browne*, has paid a composition of £500 in respect of his liability, and I should be glad if the other gentlemen would make some offer which could be accepted by the official liquidator; but all I can do is to decide, upon the grounds I have stated, that all of them are jointly and severally liable for the whole sum of £3000, with interest at £5

(1) 5 Ch. D. 306, 322.

(2) Law Rep. 10 Ch. 593.

per cent. on the £3500, from the days of the payment of the cheques to *Sheridan*. As to the costs, they must all be jointly and severally liable to pay the costs in Chambers, and upon this application. They will have fourteen days for the payment.

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*Wingrove* appealed. The appeal was heard on the 19th of December, 1877, and the 23rd of January, 1878.

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*Whitehorne*, for *Wingrove*:—

Argument.

*Elliott v. Richardson* (1) is distinguishable. The preliminary expenses were a real debt from the company to *Sheridan*. The company would have had to pay the preliminary expenses if *Sheridan* had not paid them.

[JAMES, L.J.:—How do you make out that the company were liable to the preliminary expenses?]

The company had adopted them: *Bagnall v. Carlton* (2). Article 81 empowered the directors to pay preliminary expenses.

[JAMES, L.J.:—No, only to repay what they had paid themselves. Here the promoters had paid themselves in a different way.]

*Pearson's Case* (3) is distinguishable. There there was no binding debt. Here there was a good debt. The money was *Sheridan's* own, and he was at liberty to pay the directors' calls if he thought fit.

*Higgins*, Q.C., and *Beale*, for the liquidator, were not called on.

JESSEL, M.R.:—

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As I intimated during the course of the argument, I cannot agree with the Vice-Chancellor, in so far as he charges *Wingrove* and his co-directors with fraud, and makes them liable on that ground to pay the £3000. It does not appear to me that they were guilty of any fraud, and if I may give an opinion which is

(1) Law Rep. 5 C. P. 744.

(2) 6 Ch. D. 371.

(3) 4 Ch. D. 222; 5 Ch. D. 336.

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not flattering to their intellectual faculties, I think that they were rather deceived than deceivers. We have to deal, however, not with the judgment of the Vice-Chancellor, but with his decision.

The question is, whether the order which he has made can be supported independently of the reasons which he has given for it,

and I am of opinion that it can; for I think that the directors are under a liability to repay which is quite independent of the amount paid on their shares, and of the question whether directors qualified by *Sheridan* were liable to pay up their shares in full.

The question is, whether under the terms of sect. 165 of the *Companies Act*, 1862, *Wingrove* and his co-directors have misapplied and become liable or accountable for any moneys of the company.

Now, in the first place, it is proved that *Edwards*, who had become entitled to sell this colliery, made an arrangement with *Sheridan* that if *Sheridan* could get up a company to purchase it for £50,000, and would pay the expenses out of his own pocket, *Edwards* would sell to the company for £50,000, half in cash and half in shares, and would divide the profit equally between himself and *Sheridan*. It also appears that *Sheridan* in fact got up the company by procuring some gentlemen to become directors of it on the terms of their not paying for their shares, and all the six gentlemen who became directors took their shares without ever paying for them. This also is to be noticed, that when those gentlemen entered into the bargain to pay the £3500 to *Sheridan*

they were not legally directors of the company, though they had agreed to become directors. Mr. *Wingrove* has raised a question peculiar to himself which, for the purpose of the present appeal, it is not necessary to decide. He contends that though he did not himself pay a shilling for his shares he was entitled to consider the £500 paid by *Sheridan* as not a voluntary payment, but as the payment of a legal debt due in respect of services rendered by him in inducing Lord *Richard Browne* to become chairman of the board of directors of the company. In the present state of the evidence I cannot help thinking that if I had to decide the point I should decide that the £500 was not a legal debt. I am disposed to think that if a man is promised £500 if he can induce a person to become a director, and goes to that person suppressing



the fact of the promise, the transaction is an immoral transaction, and the person who was to receive the bribe could not maintain an action for it. I should not, however, be willing to decide this question without further inquiry into the facts, and for the present purpose I will take it that there was a legal debt of £500 due from *Sheridan* to *Wingrove*, which I am willing to believe *Wingrove* understood to be the case. But what was the bargain with *Sheridan*? *Sheridan* was the promoter of the company, and known to be so, and I cannot believe that any men of business dealing with him could suppose that he was incurring trouble and expense without a view to making a profit out of the transaction; and no source is suggested from which a profit could come except the funds of the company.

On the 13th of March, 1873, *Sheridan* writes a letter to the board, saying, "It is I believe understood and agreed between the board and myself, that the sum of £3500 is to be paid to me upon allotment for my risk and outlay in this matter, as preliminary expenses." That is what is commonly called promotion money. On the 18th he writes to the chairman: "In the event of there being no allotment of the shares of the *Englefield Colliery Company, Limited*, I hereby undertake to defray all the expenses in connection with the formation of the company, and to hold the directors harmless in respect of the same." Therefore, at the time of the formation of the company, these gentlemen had agreed to pay *Sheridan* promotion money out of the funds. In this state of circumstances *Wingrove* says that £3500 was paid to *Sheridan* for preliminary expenses, for which it was believed that the company was liable, but I am satisfied that there was no real investigation of the amount of the claim. The first item mentioned is a fee of £1000 to the brokers for allowing their names to be used, which might be a useful expense, but not an expense incident to the formation of the company. The first duty of *Wingrove* and his co-directors was to ask for details of the expenditure, and see what *Sheridan* was getting. The 81st clause of the articles provides that the directors may "pay and reimburse themselves out of the capital" of the company, or any other moneys of the company in their hands, all printing, legal, and all other expenses whatsoever, incurred in the formation of the company; also they may pay

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brokers and others a commission for raising the capital or placing the shares of the company." There is here no power to pay *Sheridan*, the words evidently refer to paying the persons who have done the work. If *Sheridan* paid those persons, the directors might repay him, but it was their duty before doing so to ask him what he had received or was going to receive for promotion of the company from any other quarter, and to take care not to let him be paid twice over. But in fact they did pay him twice over without making proper inquiry. They had placed themselves in such a position towards him that they could not ask him the question. They had bound themselves hand and foot by agreeing to pay him this sum, so that they could not exercise the discretionary power conferred upon them by clause 81, and the transaction cannot be represented as an honest *bonâ fide* exercise of that discretion. The directors availed themselves of a power which was emphatically a discretionary one, and made it a means of giving away the property of the company. The company was formed in March; in May the directors vote £1200 to *Sheridan* on account of preliminary expenses, and he applies it in paying calls on the directors' shares, and, taking the matter in the way most favourable to *Wingrove*, the directors who had taken shares were never called upon to pay, but wanted to get the money in this way.

I am always extremely unwilling to press technical points against honest trustees who are fairly performing their duty, or who believe they are fairly performing their duty, but I confine this observation purposely to the case of conscientiously honest trustees who are anxious to do their duty, and I cannot extend it to the case of gentlemen who enter into this kind of preliminary agreement from which, whether legal or not, they could not withdraw, and who shut their eyes to the fact that *Sheridan* was making a large profit out of the transaction. It appears to me that neither legally nor substantially—I do not like to say morally—was this power fairly or properly exercised. Consequently the money of the company has in fact been misapplied and the order of the Vice-Chancellor ought not to be disturbed. With regard to costs, Mr. *Wingrove* has obtained by this appeal a very considerable advantage with regard to his reputation and position, but as the decision of the Vice-Chancellor has not been altered, this will

not exempt him from the payment of the costs, which ought to follow the result.

BAGGALLAY, L.J. :—

These five directors have been ordered jointly and severally to repay £3500, with interest, less £500, which has been repaid by their co-director. This sum of £3500 was mainly expended in paying the calls on the shares of the directors, the payments being made at different times between the 5th of May, 1873, and the 4th of March, 1874, and being made by *Sheridan* out of sums received by him from the funds of the company, by order of the directors. It is not pretended that on any occasion when the directors ordered a payment to *Sheridan* any accounts were laid before them, but the payments were made pursuant to an agreement entered into between the board and *Sheridan* on a day before the day on which the company was formed. An agreement was then come to with him to pay him £3500 for preliminary expenses. I cannot shut my eyes to the fact that the directors were nominees of *Sheridan*, and that he had agreed to indemnify them from all liability in respect of their shares. All of them, therefore, had an interest in adopting the views of *Sheridan*, and were not in a position to exercise an independent judgment. It is not pretended that the tradesmens' accounts were produced, but he produced a list in which he had entered the sums due to them at certain amounts. No vouchers were required, and the resolution was for payment, not on production of vouchers, but merely on production of letters from the tradesmen, stating that they did not hold the company liable. Payments made on the footing of an agreement of this kind, without investigation, were improper. It would, in my view, have made no difference if there had been no agreement by *Sheridan* to pay upon the shares taken by the directors. They would still have been under an incapacity to exercise an independent judgment in voting to him this sum of money. I am, however, satisfied that these payments were ordered for the purpose of enabling him to pay the calls on the shares. I am of opinion that the order of the Vice-Chancellor must be affirmed; but I agree with the Master of the Rolls in saying that no case of fraud is made out against the Appellant.

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I agree that the order of the Vice-Chancellor ought to be affirmed. I do not see that the directors did anything which can be described as being a gross fraud, or as being a fraud at all. But under the Act it is not necessary that we should come to the conclusion that there has been fraud. Sect. 165 does not merely apply to transactions calling for moral censure, it applies equally to a misfeasance not calling for such censure. Under the term "misapplication" we need only find two elements; that moneys of the company have been applied as they ought not, and that the directors have done this without exercising a fair discretion as to the propriety of the application. What are the facts? *Edwards*, in substance, had agreed to purchase the colliery for £4500 in cash and £11,000 in shares. In February, 1873, *Edwards* and *Sheridan* agreed to form a company to purchase the colliery for £50,000, half in cash and half in shares. *Edwards* in his evidence says: "I agreed with *Sheridan* that he was to get up the company and that I should sell to the company for £25,000 in cash and £25,000 in paid-up shares, and that as between him and myself he was to pay all expenses up to allotment, and that we would equally divide the surplus." The cash payment was afterwards reduced to £8500 and the share payment increased to £41,500. *Edwards* received the £8500 and paid to *Sheridan* or by his direction £3250. *Sheridan* therefore was repaid his preliminary expenses, and this was not a case in which the directors ought to have exercised the discretion given them by article 81, to pay these expenses. In paying *Sheridan* this £3500, which certainly was an improper payment, the directors did not use ordinary care and caution. I agree that they are not to be charged with moral fraud, but we must observe the position in which they stood with respect to *Sheridan*. Their interests were in some respects identical with his and antagonistic to those of the company, therefore proof of care and caution on their part is requisite. These gentlemen had agreed beforehand to pay him £3500 for preliminary expenses. It does not appear to me that such an agreement would by itself bring the directors within sect. 165, but when it is coupled with the payment by *Sheridan* of the calls on their shares, it is a very strong circumstance. No inquiry was made of *Sheridan* as



to the profit he was making by the transaction, and we find that the payments made to him coincide in point of time with payments made by him for the benefit of the directors.

I think, therefore, that there was a misapplication of the funds of the company for which the directors were liable.

Solicitor for the Liquidator: *F. C. Mathews.*

Solicitors for the Directors: *Carr, Bannister, Davidson, & Morriss; Oehme & Summerhays; Kendall & Congreve.*

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## JEWITT v. ECKHARDT.

[1877 J. 144.]

*Copyright—Design—Agreement for Sale—Exclusive Right to sell Manufactured Article—Registration—Proprietor—Assignment or License not in Writing—5 & 6 Vict. c. 100, s. 6.*

A partial assignment of, or license to use, a design under sect. 6 of the Act 5 & 6 Vict. c. 100, must be in writing, and can only be made by a registered proprietor.

By a verbal contract made in July, 1877, *C.*, an American manufacturer, purported to sell to the Plaintiff the exclusive right to sell in *England* an article newly designed and then about to be manufactured, and also to obtain such protection for the same as he could do under English law, it being stipulated that the Plaintiff should obtain the article exclusively from *C.*: by the same contract *C.* agreed to sell to the Plaintiff the first twenty cases of the article for the price agreed upon, which was to cover both the right and the goods. In September, 1877, the cases were delivered in *England* to the Plaintiff, who paid the money due under the contract. Meanwhile, in August, 1877, the Plaintiff had obtained registration of the design under 5 & 6 Vict. c. 100, and the copyright therein was granted to him for the term of three years. In an action to restrain the alleged infringement by the Defendant of the Plaintiff's copyright:—

*Held*, on the evidence, that the Plaintiff had not acquired under the contract the right to apply the design to a manufactured article, so as to entitle him to register it in his own name under the Act:

*Held*, also, that the Plaintiff's right (if any) to protection could not have accrued till the completion of the purchase.

Statement.

THE Plaintiff in this case, who carried on business as an importer of toys and other articles from *America*, sought to restrain an alleged infringement by the Defendant of the Plaintiff's copyright in a design of which the Plaintiff claimed to be the registered proprietor, as being a new and original design within the meaning of the *Designs Copyright Act*, 5 & 6 Vict. c. 100.

The Defendant also carried on a business similar to the Plaintiff's as an importer of toys from *America*.

In July, 1877, Mr. *Crandall*, a manufacturer of toys in the *United States* of *America*, was in communication with *W. W. Rose*, the Plaintiff's agent at *New York*, with respect to a new toy called the "*Schoolmaster and Desk*" which *Crandall* then had in preparation. The negotiations were subsequently carried on in

*New York* between *Crandall's* agents at that place and *Rose*, and it was ultimately agreed that the Plaintiff should purchase from *Crandall* the first case of toys manufactured according to the then unpublished design, and also the right in *England* to the design itself for the sum of money then agreed upon. *Crandall* agreed that the Plaintiff should take every means in his power to protect the right so sold to him, and also that he (*Crandall*) would not supply any toys of that design for this country except to the Plaintiff, and it was, on the Plaintiff's behalf, agreed that he would not manufacture the toys, but purchase all he required from *Crandall*. There was no agreement in writing between the parties.

Soon afterwards *Crandall* forwarded the first case of toys made by him to *Rose*, to forward to *England*, to enable the Plaintiff to protect the design. Accordingly, on the 7th of August, 1877, the Plaintiff obtained registration under the Act 5 & 6 Vict. c. 100, and a copyright in the same was granted to him for the term of three years. In September, 1877, the Plaintiff received the case of toys, and paid to *Crandall* the sum agreed upon.

Subsequently to the registration by the Plaintiff and the receipt of the first consignment, the Defendant, who carried on business as an importer of toys from *America*, sold toys in *England* which were admitted to be of the same design as those sold by the Plaintiff. These toys were obtained by the Defendant from *Crandall*, but it was alleged by the Plaintiff that in thus supplying them, *Crandall* was not aware that they were destined for sale in *England*.

The Plaintiff thereupon brought his action, alleging that the Defendant had knowingly and wrongfully sold the toys in infringement of the Plaintiff's copyright, and claiming an injunction to restrain the Defendant from selling the toys or infringing the Plaintiff's copyright.

The Defendant, by his statement of defence, denied that the Plaintiff had a copyright in the design, which he alleged had been published before, and he further alleged that the toys sold by him (the Defendant) had been purchased from *Crandall* in the ordinary way of business, and that he had the same right to resell them as the Plaintiff.

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The Plaintiff, on the other hand, alleged that, though the Defendant had obtained the toys from *Crandall*, the latter was not aware that they were intended for sale in *England*.

*W. W. Rose* stated in his evidence before the Court that the arrangement made by him on *Jewitt's* behalf with *Crandall* was that he (*Rose*) was to have one of the copies of the toy called "*Schoolmaster and Desk*," designed and manufactured by *Crandall*, but not quite complete, to send to the Plaintiff for the purpose of obtaining such protection for it as he might under English law, and the whole matter was to be kept perfectly secret till such time as *Jewitt* could do so. It was at the same time arranged that, when the goods were manufactured and ready for delivery, he (*Rose*) was to purchase the first twenty cases, and that for these and the right to register the design he was to pay *Crandall*; that it was further agreed that he was to have as many more of the goods as he could sell, and that *Crandall* was not to supply them to any other person for export to *England*; that he understood, as part of the consideration, that the Plaintiff should use every reasonable effort to extend the sale in *England*, and should not sell toys bought of any one else; that the goods were delivered on the 8th of September, 1877, and that he (*Rose*) paid for the whole 660 dollars. He further stated that the design and goods were not separated in the agreement, but bought and paid for together, and that he bought the right to register the design so as to obtain the exclusive use of it in this country.

Argument.

*Davey*, Q.C., and *Chadwyck Healey*, for the Plaintiff:—

The Plaintiff, under the contract, obtained from *Crandall* for valuable consideration a new and original design within the meaning of sect. 5 of 5 & 6 Vict. c. 100. He was therefore entitled to register the same as his own copyright. It is true that there was no actual assignment in writing, but we contend that an assignment is only required by the Act to be in writing after the design has been actually registered. A copyright in a design differs from that in a book, in the latter case an assignment before registration must be in writing: *Layland v. Stewart* (1). This is not necessary in the present case, for the copyright only arises from the regis-

(1) 4 Ch. D. 419.



tration. Even assuming that the Plaintiff was a mere licensee, he would still be entitled to protection under sect. 5 of the Act. It is not disputed that if the Plaintiff is entitled to copyright he is entitled to succeed in the action.

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Argument.

*Aston*, Q.C., and *Methold*, for the Defendant :—

The Plaintiff is not entitled to the copyright in this design. Under the contract with *Crandall* there was no separate consideration in respect of the design, as it was included in the lump sum paid for the articles purchased. An assignment of a right to be registered, whether under the Act or otherwise, must be in writing.

JESSEL, M.R. :—

Judgment.

I am not satisfied on the evidence that *Crandall* ever sold or that the Plaintiff ever bought the design; but I am going to decide also on another point.

As I understand Mr. *Rose's* evidence (and I am assuming now that *Jewitt* authorized *Rose* to act as his agent), what was really sold was this: the exclusive right to *Jewitt* to sell *Crandall's* toy in *Europe*, and the right to take such means, by patent or registration, as would secure that exclusive right. In my opinion, that does not include the right to register in *Jewitt's* own name, because a registration in *Crandall's* name would have effected the whole of the security contemplated. He is a person who did not know the law of *England*, and he did not intend to do more than secure the right of selling those toys manufactured by *Crandall*. I do not think that is a right of design at all, because, when you consider what the right to a design is, it is a statutory right, and the sole right to apply the design. The statute 5 & 6 Vict. c. 100, s. 3, provides, "That the proprietor of every such design, not previously published, either within the United Kingdom of *Great Britain* and *Ireland*, or elsewhere, shall have the sole right to apply the same to any articles of manufacture or to any such substances, as aforesaid."

Now, in my opinion, *Jewitt* never had the right to apply the design to any article manufactured. It is expressly stated that *Crandall* was to retain the right to manufacture the articles. I cannot find in this Act of Parliament any other right. There is

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a limitation of the right, for he is only to have that right to apply it for a certain period, and if it is registered; but the thing which is protected is the right to apply the design to the articles so manufactured. As I said before, I think *Crandall* kept it, and therefore in no sense and in no way did *Jewitt* become the proprietor of the design.

Now, what else could he claim? It is said that under the 3rd section he may acquire "the right to apply the same" to ornamenting any one or more articles of manufacture. That is all he has to acquire—"the right to apply the same." The words of the 5th section are the same. Then it goes on, "and also every person upon whom the property in such design or such right to the application thereof shall devolve." That is the same thing. The only right dealt with by the Act is the right to apply the design. It appears to me, in order for a man to be a proprietor within the Act, he must have some right, either general or limited, to apply the design. Therefore I hold that *Jewitt* is not a proprietor at all, either of the entire right, or of a limited right.

Now, I want to deal with another question raised in argument, which, although perhaps it is not necessary for me to decide, I wish to deal with, and give my opinion on, for what it is worth as to the law, and that is with regard to a verbal contract *in fieri*. The facts seem to be these.

An arrangement made in July—I will assume now that *Crandall* and *Jewitt* were the parties—if they dealt by their respective agents they were the parties—to sell a right to apply the design for a limited space in *Europe*, as is alleged to be the case here, and a parcel of goods to which the design was to be applied at a future day, that is, to be delivered and to be paid for on delivery. The delivery takes place in September. I hold that before September nothing passed. It is quite plain that it was inchoate until September, and until the delivery of the goods there was no complete bargain. Mr. *Jewitt*, as Mr. *Rose* told us—and I must say he gave his evidence in a very candid and satisfactory manner—did not agree to buy one as separate and distinct from the other, but bought both right and goods together. He would not have paid his 660 dollars if he had got no goods, and therefore, until the goods were delivered, there was nothing to pass

the right to the design to *Jewitt*; and it seems to me that in no way by this verbal contract, even supposing a verbal contract would do, did anything pass to *Jewitt* at all, supposing I was wrong, which I do not think I am, as to the meaning of a design. I think, therefore, on this ground also *Jewitt* fails.

Now I come to another question, and I must say that the point is not as clear upon the Act of Parliament as I could wish. This Act of Parliament requires the assignment of a copyright in a design to be in writing. We must recollect that this right is a statutory right, it is created by this statute. Of course the statute which creates it may also point out how it is to be assigned or dealt with. It seems to me, on the fair construction of the Act of Parliament, although I admit it is very obscure—and, as I have often said in these matters with regard to these obscure instruments, whether they are Acts of Parliament or wills, opinions may differ—that the assignment or license must be in writing.

My reason for saying so is, that when you come to look at the framing of the Act of Parliament it stands in this way: the 3rd section provides that the proprietor of a design shall have the sole right to apply the same to any articles of manufacture for a certain term of years. Then when you come to the 5th section it makes the proprietor who is to have this sole right not merely a sole proprietor but a limited proprietor, including, as I read it, a licensee. The words are: "Every person acquiring for a good or a valuable consideration a new and original design, or the right to apply the same," which is the same thing for the purpose of the Act of Parliament, "to any one or more of the articles registered, or any one or more substances"—you can divide it in that way, and can give a right to apply it to certain articles and not to others—"every person upon whom the property in such design or such right to the application thereof shall devolve"—it may devolve on an executor, and so on—"shall be considered the proprietor of the design." Therefore a licensee does acquire the right to a design as well as an assignee, so that a partial assignee or a total assignee, or any person upon whom the right may devolve, whether executor or administrator, is also within the Act. Then it gives the person the right not as proprietor according to the 3rd section, but to the extent to which his right may have been acquired, but

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not otherwise. It is a kind of supplement to or interpretation of the 3rd section. He shall have the sole limited right, or the limited sole right. It is not absolutely exclusive, but only to the extent of excluding other persons who have not any share of the right at all, and no further.

But as I read the 6th section it provides that the person purchasing or otherwise acquiring the right to use any such design "may enter his title in the register hereby provided, and any writing purporting to be a transfer of such design and signed by the proprietor thereof, shall operate as an effectual transfer; and the Registrar shall, on request and the production of such writing, or in the case of acquiring such right by any other mode than that of purchase on the production of any evidence"—that is devolution, such as death or administration—"to the satisfaction of the Registrar," enter it in the register. Now, what is the entering on the register? "I, A.B., author or proprietor of design No. having transferred my right thereto, &c." That shews it is a design already registered. You cannot enter on the register a transfer of any design not registered, and that transfer must obviously be in writing, because the writing is produced to the Registrar. So that whenever you get a partial assignment, or a license, or a devolution by law after the registration, it obviously must be in writing.

On the other hand, can you register an assignment or license before the proprietor himself has registered? It would have this very singular consequence if you could. If a license by the author or the sole proprietor of a design be granted before registration, and the licensees had a right to register and to publish, nobody else could register it afterwards, and the original proprietor would lose his right, which would be a singular result. Whereas, if the provision of the Act is, as I think it is, to have registration on the part of the author and proprietor before he grants out the partial interests, then there is no difficulty, because every man who gets a partial interest registers under the 6th section, and that grant must be in writing. It seems to me that that is the real meaning of the Act, although it is not so perfectly expressed as I should like.

I think that is slightly corroborated by the 10th section, which provides that "in any suit in equity which may be instituted by



the proprietor of any design or the person lawfully entitled thereto relative to such design, if it shall appear to the satisfaction of the Judge having cognisance of such suit that the design has been registered in the name of a person not being the proprietor or lawfully entitled thereto, it shall be competent for such Judge in his discretion by a decree or order in such suit to direct either that such registration be cancelled (in which case the same shall thenceforth be wholly void) or that the name of the proprietor of such design or other person lawfully entitled thereto be substituted in the register for the name of such wrongful proprietor or claimant."

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That shews, as it appears to me, that it was intended that the original proprietor should register. I am satisfied that the meaning of the Act is to make the law very similar in that respect to the patent law, where the original patentee having granted the license, the licensee comes afterwards and registers. There are also other points in the case upon which I think it probable the Plaintiffs might not have succeeded.

The action must be dismissed with costs.

Solicitor for the Plaintiff: *W. W. Wynne.*

Solicitors for the Defendant: *Saunders, Hawksford, & Bennett.*

*In re* MASON.

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[1877 M. 373.]

*Will—Gift of Annuity—Direction to pay out of Income of Residuary Estate—Charge on Corpus—Charging Prospective Income.*

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*962*  
*187*  
*Wick Dsg*

A testator bequeathed life annuities to various persons, and then bequeathed his general personal estate to trustees, "upon trust out of the income thereof to pay and keep down" the annuities, and, "subject thereto," upon trusts for his son and daughters:—

*Held*, that the annuities were chargeable on the corpus.

*W. H. MASON*, coachmaker, by his will, dated the 1st of March, 1876, bequeathed to his wife an annuity of £500 (after-

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wards increased by codicil to £700) during her life ; to each of his daughters who should be married in his wife's lifetime an annuity of £100 during the joint lives of such daughter and his wife ; and also certain life annuities, amounting altogether to £140, to his sisters and brother therein named. And the testator bequeathed his personal estate not specifically disposed of to trustees upon trust for sale, and to invest the proceeds in some or one of the investments thereafter authorized, "and to stand possessed thereof upon trust out of the income thereof to pay and keep down such of the annuities hereinbefore bequeathed as for the time being shall be payable ; and subject thereto," and to the provisions thereafter contained as to advances or gifts to his daughters in case of their marrying, and to his son in case of the transfer of his business to him, upon trust, so long as his said son should be living and under the age of twenty-one years, to accumulate and invest the surplus income ; and from and after his said son attaining twenty-five years, or from and after his death, if he should die under that age, in trust, as to the capital and accumulations, for his (testator's) two daughters equally ; and the will contained certain trusts of the daughters' shares by way of settlement, with a remainder over, in certain events, upon trusts under which the son was interested.

The testator died in January, 1877, leaving his widow, his son, who was now twenty-one years of age, and his two daughters, both of whom were under age and unmarried.

Besides the annuity of £700 to the testator's widow, the annuities to his sisters and brother were immediately payable.

The annual income of the testator's general personal estate amounted to about £700 per annum only, and therefore was now and probably for some years to come would be insufficient to keep down the annuities, amounting to £840, at present payable.

Under these circumstances the widow brought this action against the testator's trustees and executors, and his three children, claiming a declaration that her annuity of £700 as well as the other annuities, ought to be paid out of the capital and accumulations of the testator's residuary personal estate, so far as the income of such residuary personal estate should be insufficient to pay the annuities.

The action now came on upon motion for judgment.

*Davey*, Q.C., and *Shebbeare*, for the Plaintiff:—

The annuities being charged upon the income, and the capital given over “subject thereto,” the corpus is liable: *Birch v. Sherratt* (1).

[They were stopped by the Court.]

*Bagshawe*, Q.C., and *Chubb*, for the children:—

This case is singular, because there is an absolute prior gift of an annuity, which does not occur, apparently, in any of the reported cases; but we submit that the corpus is not liable, and that this is a simple case of tenant for life and remainderman, as in *Attorney-General v. Poulden* (2), *Baker v. Baker* (3), *Miller v. Huddleston* (4), and *Michell v. Wilton* (5). It may be a question whether, if the annuities are not charged on the corpus, they are not a continuing charge on the prospective income: *Taylor v. Taylor* (6); even after the deaths of the annuitants: *Booth v. Coulton* (7); and probably that construction would be more unfavourable to the children.

[They also cited *Wright v. Callender* (8).]

[JESSEL, M.R., referred to *Stelfox v. Sugden* (9).]

*Roxburgh*, Q.C., for the trustees.

JESSEL, M.R.:—

I have not received from the learned counsel on either side a suggestion that there is any authority that where there is a simple gift of an annuity followed by a direction to set apart a fund to secure it, that will cut down the right of the annuitant to receive only the income of the fund: I must therefore assume that no such authority exists.

Now here is a gift of certain annuities, and a trust or direction to set apart a fund to answer them is created in this way: the testator bequeaths his residuary personal estate to trustees upon

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(1) Law Rep. 2 Ch. 644.

(2) 3 Hare, 555.

(3) 6 H. L. C. 616.

(4) 3 Mac. & G. 513.

(5) 23 W. R. 789.

(6) Law Rep. 17 Eq. 324.

(7) Ibid. 5 Ch. 684.

(8) 2 D. M. & G. 652.

(9) Joh. 234.

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trust for sale, and to invest the proceeds in some or one of the investments thereafter authorized, "and to stand possessed thereof upon trust out of the income thereof to pay and keep down such of the annuities hereinbefore bequeathed as for the time being shall be payable; and subject thereto" upon trusts for his son and daughters.

The question is, what is the meaning of the trust in this will? It is a trust to keep down the annuities, in the first place, no doubt, out of income, but it is not the less a trust to keep down: it does not do more than indicate a mode of providing for the annuities previously given. Why, then, should it prevent payment of the annuities being made out of the capital if the income proves insufficient? I am of opinion it ought not to do so, and that the arrears of the annuities may be paid out of the capital if the specific means provided for payment shall not be found sufficient for the purpose.

Now there are two classes of cases between which I think a distinction should be made. The first is a class of cases of which *Baker v. Baker* (1) is an instance, in which the testator has not given the annuity at all, but has directed a sum of money to be set apart which shall be sufficient to pay an annual sum, and then directs the income of the sum so set apart to be paid to a person for life. That is not a gift to an annuitant of a sum of money specifically mentioned, but it is a direction to set apart a capital sum, and what is given, and what the person to whom the income is to be paid takes, is the income of that capital sum which accrues due during his life, and nothing else. That is the true explanation of the decision in *Baker v. Baker*.

There is another class of cases of which *Booth v. Coulton* (2) is one, in which there is not a gift of an annuity *simpliciter*, but a fund is directed to be invested, or there is an existing investment, or an existing estate producing income, and the testator directs that out of the income of the sum to be invested, or of the existing investment, or out of the rents of the existing estate, a life annuity is to be paid, and subject thereto the fund or estate is to go elsewhere.

That class of cases has been held to mean this, that, there being

(1) 6 H. L. C. 616.

(2) Law Rep. 5 Ch. 684.



no direction that the annuity is to be paid out of the income to accrue during the life of the annuitant, the annuity is a charge upon the income even beyond the life of the annuitant, so that no one can take the income till the arrears of the annuity are satisfied.

Now, my view is, as I have said, that the words here are sufficient to create a charge of the annuities upon the corpus; but if I am not right in that view, the words are at all events sufficient to bring the case within the second class of cases, that is, to create a charge of the annuities upon the income until the arrears of the annuities are made up. I have not, however, been pressed to adopt that view, and looking at the authorities and the reason of the thing, I do not think I ought to extend that inconvenient construction to a case where there is a clear prior gift of an annuity, as in the present instance.

There will, therefore, be a direction that the growing deficiency of income to pay the annuities shall from time to time be made up out of the capital.

Solicitor: *A. T. Cox.*

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CANNON v. VILLARS.

[1877 C. 490.]

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March 7.

*Landlord and Tenant—Right of Way, Restricted or General—Obstruction—Injunction.*

Defendant, the owner of a house with a gateway and a paved road under it leading to a paved yard, and a vacant piece of ground at the rear, agreed to grant to the Plaintiff a lease of the house and vacant ground and the appurtenances, with power to erect on the vacant ground a workshop for the purposes of his business as a gas engineer, and it was stipulated that the Plaintiff should not obstruct the gateway, except for the purposes of ingress and egress. The workshop was erected, and the only access to it by vehicles was through the gateway and over the yard which were also the only approach to the stables of the Defendant, who carried on business in adjoining premises. The Defendant's vans, before the agreement was entered into, had often stood in the yard when not in use. The Plaintiff now alleged that the Defendant blocked up the gateway and yard with his vans, and prevented the access of carts and vehicles to his workshop:—

*Held*, that, under the agreement, the Plaintiff had an implied right of

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way through the gateway and over the yard for the reasonable purposes of his business; that such right was general and not restricted; and that he was entitled to an injunction to restrain the Defendant's obstruction.

**T**HIS was an action to restrain the obstruction of a right of way under an agreement.

At the time when the agreement was executed the Defendant was the owner in fee of a house, No. 1, *Bath Street, Southwark*, with a gateway under it, and a yard at the rear, part of which was covered. The road under the gateway, and also the yard, were paved with stone and formed the only approach to certain stables belonging to and occupied by the Defendant. The Defendant, who was an upholsterer, carried on business in premises adjoining, and kept vans for the purposes of his business, which before and at the time when the agreement was entered into were kept standing, when not in use, in the covered part of the yard.

On the 24th of June, 1876, the Defendant entered into an agreement with the Plaintiff, who was a manufacturing gas engineer, which agreement, so far as material, was as follows:—

“The landlord agrees with the tenant to grant to him, his executors, administrators, or nominees, and the tenant agrees with the landlord to take, all that messuage situate at No. 1, *Bath Street*, together with a piece of vacant ground in the rear thereof, measuring forty feet long and ten feet wide at one end, and fifteen feet wide at the other end, with the appurtenances, for the term of fourteen years.

“The said lease is to contain all usual and proper covenants, and particularly power for the tenant to erect on the said vacant piece of ground a workshop for the purpose of his business as a gas engineer; and such lease and the counterpart thereof are to be prepared at the expense of the tenant.

“The tenant is in no way to obstruct the entrance and gateway, except by the use of the entrance for the purposes of ingress and egress, neither shall the tenant underlet the said house or workshop without the written consent of the landlord.”

The Plaintiff had entered into possession and erected at the rear of the yard, in pursuance of the agreement, a workshop in which he carried on his said business.

The only means of access from the high road to the workshop, excepting through the house door, was through the gateway and over the yard. The gateway, when unobstructed, was sufficiently wide to admit the passage of trucks, carts, and vehicles of all kinds.

The Plaintiff alleged that it was necessary, for the purposes of his business, that there should be a free and unobstructed means of ingress, egress, and regress for trucks, carts, vans, and horses through the gateway and over the yard; that in June, 1877, the Defendant began, and had since continued, to block up and obstruct the gateway and yard by permitting his vans to be drawn within the same and to remain there at all hours of the day and night, so that frequently only a passage of from two to four feet was left, and sometimes there was no room for a single person to pass; that thus the Plaintiff was prevented from using the gateway and yard for the purpose of taking into or removing from his workshop any work or materials requiring for their conveyance a truck, cart, or van, and from enjoying such right of access as for the purposes of his business he was entitled to enjoy.

The Plaintiff alleged that he had sustained loss and injury by these acts of the Defendant, and claimed an injunction to restrain the Defendant, his agents or workmen, from obstructing or blocking up the gateway and yard, or from interfering with the free ingress and egress of the Plaintiff, with or without trucks, vans, carts, and other vehicles.

The defence was that the Plaintiff had only a right of footway under the agreement, and not a right of way for trucks, carts, vans, or other vehicles; also, that the Defendant had been in the habit of using the covered part of the yard for his own vans before the agreement was entered into, and was still entitled to place them there when not in actual use.

*Chitty, Q.C., and Tremlett, for the Plaintiff:—*

The Plaintiff in this case seeks to establish a right of way either by grant or necessity through the entrance or gateway under the house he occupied and over the yard to the workshop which he has erected at the rear, and claims an injunction to restrain the Defendant from blocking it up by his vans. The Defendant

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admits that the Plaintiff is entitled to a right of footway, but we contend the words of the agreement give him a general and not a limited right of way, for he was authorized "to erect on the vacant piece of ground a workshop for the purposes of his business as a gas engineer." This would imply such right of access to the workshop when erected as the purposes of his business required, including necessarily access by carts or waggons.

In *Newcomen v. Coulson* (1), where an award under an Inclosure Act directed that certain allottees of land should have a right of way which in terms was only applicable to agricultural purposes, and provided that in case they should "shut out" the way the same should be of a certain width, an owner of one of the allotments having commenced building houses upon the way, which was before a trackway, it was held that they were entitled to construct a substantial roadway applicable to the purposes for which it was now being applied.

The grantee of a tenement is entitled to sufficient way-leave for the purposes of his tenement. Here the right claimed, having regard to the Plaintiff's business, which is referred to in the agreement, must include the right of access for vehicles, and the Defendant should be restrained by injunction from the obstruction complained of.

*Davey, Q.C., and W. C. Harvey, for the Defendant:—*

There is nothing in this case to shew that this is a way of necessity, nor can it be implied as a way of grant. The words of the agreement, which is only an informal agreement for a lease, cannot be construed as giving more than a right of footway to the Defendant's workshops.

In *Cousens v. Rose* (2), where, under a lease of a dry dock and warehouses, a right of way was established over the whole of a strip of land between the dock and the warehouses, it was held that the right was confined to foot-passengers.

In construing this agreement regard must be had to the relative position of the parties and to the use made by the Plaintiff of this gateway and yard at the time when the agreement was entered into. It appears that the Plaintiff had been in the habit of using

(1) 5 Ch. D. 133.

(2) Law Rep. 12 Eq. 366.



the gateway and yard for his own vans, as they constituted the only approach to his stables, and the vans when not in use usually stood under the covered part of the yard. He cannot therefore now, in the absence of express words, be deprived of the reasonable use of the gateway and yard, especially as by the agreement the tenant was in no way to obstruct the entrance and gateway, except for the purposes of ingress and egress. At any rate, if the injunction is granted, it cannot extend to deprive the Defendant of the reasonable use of his own freehold. In the *United Land Company v. Great Eastern Railway Company* (1), where an injunction was granted to restrain the obstruction of the free use of level crossings over a railway, claimed by the occupiers of neighbouring houses, the injunction did not extend to restrain the company from the use of the railway for the reasonable and proper working of the traffic.

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This case has been elaborately argued, but I confess it appears to me that there is really no question either as to what is the law or as to what is the true construction of this agreement. In construing all instruments you must know what the facts were when the agreement was entered into. The first fact here is that the only access to the piece of ground let to the Plaintiff for the purpose of the erection of the workshop available for any cart, waggon, or other vehicle, was through a paved gateway which was the entrance to a long yard also paved in a manner fitted for the passing of carts, waggons, and other carriages. As I understand, it was a stone paved way, so stoned as to be sufficient and proper for that passage. The only other access at all to the *locus in quo* was through the door of a house through which it is admitted carts, waggons, and carriages could not pass. The ownership both of the land of the yard and of the gateway was in the landlord, the Defendant, Mr. *Villars*.

The Plaintiff is a gas engineer, and wished to take the piece of land up the yard for the purpose of building a workshop on it. At the time the agreement was entered into the landlord had

(1) Law Rep. 10 Ch. 586.

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some stables up the yard, to which, I am told, no coachhouse was attached, and he used vans for the purpose of his business, and those vans, of course, when in use were outside in the streets of the town, and when not in use were put under the covered portion of the yard, which immediately adjoined the gateway or entrance. It was stated that these vans did not go out for a whole day, although on working days they usually went out for the whole or a part of the daylight.

Now I will say a word or two about the law. As I understand, the grant of a right of way *per se* and nothing else may be a right of footway, or it may be a general right of way, that is a right of way not only for people on foot but for people on horseback, for carts, carriages, and other vehicles. Which it is, is a question of construction of the grant, and that construction will of course depend on the circumstances surrounding, so to speak, the execution of the instrument. Now one of those circumstances, and a very material circumstance, is the nature of the *locus in quo* over which the right of way is granted. If we find a right of way granted over a metalled road with pavement on both sides existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed, which is obviously the passage not only of foot passengers, but of horsemen and carts. Again, if we find the right of way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right of way to a place which is stated on the face of the grant to be intended to be used or to be actually used for a purpose which would necessarily or reasonably require the passing of carriages, there again it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used.

Where you find a road constructed so as to be fit for carriages and of the requisite width, leading up to a dwelling-house, and there is a grant of a right of way to that dwelling-house, it would be a grant of a right of way for all reasonable purposes required for the dwelling-house, and would include, therefore, the right to the user of carriages by the occupant of the dwelling-house if he wanted to take the air, or the right to have a waggon drawn up to the door

when the waggon was to bring coals for the use of the dwelling-house. Again, if the road is not to a dwelling-house but to a factory, or a place used for business purposes which would require heavy weights to be brought to it, or to a wool warehouse which would require bags or packages of wool to be brought to it, then a grant of right of way would include a right to use it for reasonable purposes, sufficient for the purposes of the business, which would include the right of bringing up carts and waggons at reasonable times for the purpose of the business. That again would afford an indication in favour of the extent of the grant. If, on the other hand, you find that the road in question over which the grant was made was paved only with flagstones, and that it was only four or five feet wide, over which a waggon or cart or carriage ordinarily constructed could not get, and that it was only a way used to a field or close, or something on which no erection was, there, I take it, you would say that the physical circumstances shewed that the right of way was a right for foot-passengers only. It might include a horse under some circumstances, but could not be intended for carts or carriages. Of course where you find restrictive words in the grant, that is to say, where it is only for the use of foot-passengers, stated in express terms, or for foot-passengers and horsemen, and so forth, there is nothing to argue. I take it that is the law. *Primâ facie* the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both those circumstances may be legitimately called in aid in determining whether it is a general right of way, or a right of way restricted to foot-passengers, or restricted to foot-passengers and horsemen or cattle, which is generally called a drift way, or a general right of way for carts, horses, carriages, and everything else.

Applying those rules to the case before me, I must say I have no doubt whatever as to the meaning of the agreement. [His Lordship then stated the terms of the agreement.] What do we here find? First we find the Plaintiff is to have power to build on the vacant piece of land. That is very material, because it is admitted on the part of the Defendant that for the purpose of building in *London* you require the right to bring up carts or

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 —

waggons with building materials, as otherwise you cannot build conveniently or reasonably. To this extent, then, at all events, it is absolutely necessary that he must have the right to come with carriages or carts. How does he get it? Only under those words, "ingress and egress;" for I agree entirely with the argument on the part of the Defendant, that where you find an express right of way granted (for there is no question about way of necessity), it is a mere question of construction as to what the extent of the right of way granted is. That being so, it is plain that he must have the right for waggons and carts, at all events, while he is building. What is to limit it? I see no words of limitation. If he has ingress and egress for waggons and carts for building, why not at all times? However, the matter does not stop there. What is he to use it for? He is to use the workshop for his business as a gas engineer. It cannot be seriously contested that the Plaintiff has a right to bring up trucks, which he constantly does, and indeed that is not contested; whether he absolutely wants to take up carts is more in contest, but has he not a right to take up coals in a cart or waggon? A gas engineer wants coal, and indeed everybody wants coal in this climate at some period of the year, whether he is a gas engineer or not; and is it to be suggested that the man who is to build a workshop and use it for the purpose of a gas engineer has not a right to bring a cartful of coals up to the shop? When you come to look at it in that way, it is obvious, without going into evidence, that it is a reasonable use of the right of way, and a use suitable for the business which is to be carried on, that he should use the right of ingress and egress for the purpose of bringing up a truck or a cart when wanted. That being so, it seems to me this is clearly to be held a general right of way.

Then there is this consideration also that it is admitted, from the width of the way, and from the character of the way, and from the mode in which the way was paved, that it is a cartway or carriageway, and nothing else, except in so far as a carriage-way and cartway always include a footway. It was constructed for that purpose, and used for that purpose. Therefore we have the other ground also present in this case.

Now, as regards the position of the vans, it is quite true the owner of the stables and the owner of the vans did at one time put



his vans on his own freehold, as he had a right to do, before he executed the grant. But is there anything in that circumstance to shew that he is to continue to put them there, obstructing the right of way granted? I cannot find it at all. It may be, after he granted the right of way, he could not keep his vans there quite so long as before; probably he could not keep them there all day at times when the Plaintiff wanted to take his trucks up. But that is not a permanent physical obstruction forming a portion of the property demised at the time the right of way is granted over it; it is a temporary accident of the business carried on by the grantor, which might be discontinued at any moment. And even if it had been necessary, which it is not, that his vans should be removed altogether, I should not think that circumstance was one which interfered with the proper legal construction of the grant. I am of opinion, therefore, that the Plaintiff is right, and entitled to an injunction to restrain the Defendant, his servants, agents, workmen, and others from blocking up or obstructing or permitting the blocking up or obstructing the entrance or yard so as to interfere with the reasonable use by the Plaintiff, his servants, workmen and agents, with trucks, vans, carts, and other vehicles for the purpose of his business as a gas engineer. It is not intended to prevent the Defendant putting his vans there as he did before, or to prevent the Plaintiff from moving them as he did before.

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Judgment.

Solicitors: *Woodbridge & Sons; W. Maynard.*

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May 1. ✓

## MAYER v. MURRAY.

[1877 M. 142.]

*Practice—Mortgagee in Possession—"Usual Account"—Proceeds of Sale—  
"Wilful Default"—Form of Judgment.*

10 Ch. D. 716-7  
2 Ch. D. 534  
37-9541  
15 Ch. D. 757-9  
700-1  
2 Ch. D. 720

In an action for account by a mortgagor against a mortgagee in possession who has sold, the mortgagor is entitled to an account of the proceeds of sale received by the mortgagee or by his order or for his use, "or which without his wilful default might have been so received;" although wilful default may not have been charged in the pleadings and proved at the trial; but such an account does not entitle the mortgagor to question the propriety of the sale or the adequacy of the amount for which the property has been sold.

*Job v. Job* (1) explained.

Statement.

THE statement of claim alleged that in 1868 the Plaintiff mortgaged certain leasehold houses to *E. W. Robertson* as security for £2000; that in 1870 *Robertson* entered into possession of the mortgaged premises, and afterwards sold the same by auction in lots; and that the Defendant, *J. Murray*, was *Robertson's* executor.

The Plaintiff claimed to have it declared that the Defendant was liable to pay him certain specific sums of money, and also to account for all moneys received by *Robertson* and the Defendant and each of them, "or which but for their or his wilful default might have been received by them or him, and also for all profits made by the Defendant in respect of the premises;" and that an account might be taken on the footing of the foregoing declarations of what was due to the Plaintiff in respect of the mortgaged premises; with consequential relief.

The defence admitted the mortgage, the taking possession of the mortgaged premises, and the fact of the sale, but denied any liability.

The action came on for trial on the 19th of March, 1878, when the order made, according to the Registrar's note, was, "Decree the usual order for account against a mortgagee in possession, and

dismiss the rest of the action." The counsel for the Plaintiff indorsed his brief "Decree an account of all the moneys received in respect of the mortgaged premises by *Robertson* and the Defendant, or which might have been received by them without wilful default, and dismiss the rest of the action." The counsel for the Defendant indorsed his brief in substantially the same terms, except that "wilful default" was limited to the rents and profits and did not extend to the proceeds of sale.

The minutes of judgment as given out by the Registrar directed, in addition to the usual account of rents and profits which the mortgagee might have received without his wilful default; an inquiry whether any of the hereditaments comprised in the mortgage security had been sold, and, if so, by whom; and if it should appear that any part thereof had been sold by *Robertson* or the Defendant, *Murray*, then an account of the proceeds of any such sale received by *Robertson* or the Defendant, *Murray*, or by any other person by their order or for their use, "or which without the wilful default of the said *E. W. Robertson* or of the said Defendant, *J. Murray*, might have been so received."

The statement of claim contained allegations amounting to charges of wilful default against *Robertson* and the Defendant, *Murray*, but at the trial the Plaintiff failed to prove them.

The Defendant now applied to his Lordship to settle the minutes by striking out the "wilful default" clause in the proceeds of sale account.

*Millar*, for the Defendant:—

There is no form of the Court which charges a mortgagee in possession with wilful default except in respect of rents and profits, and it is entirely novel to say that a mortgagee selling is liable for wilful default, when no case of wilful default has been proved against him. The two forms of a decree against a mortgagee in possession in *Seton* on Decrees (1), charge wilful default only in respect of rents and profits, and the reason why he is so charged is that he must account for what he receives in his character of mortgagee in possession: all he has to shew is that the original owner is not injured by his having taken possession. I do not

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(1) 3rd Ed. pp. 366, 367.

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dispute the right of the mortgagor to have an account of proceeds of sale, but I submit that to charge the mortgagee with wilful default under that account, no case having been proved against him, is entirely contrary to the usual practice, and if the indorsement on my brief is correct, your Lordship intended that "wilful default" should be confined to rents and profits, in the usual way.

*Mulligan*, for the Plaintiff, was not called upon.

Judgment. JESSEL, M.R. :—

12CLD537  
 21CLD761  
 The question I have to decide is one of principle, and it also depends to a certain extent upon authority. There seems to be some doubt as to what order I made at the trial of the action, but what I really did decide at the time I take from the Registrar's note. From that note I see I directed the "usual account against a mortgagee in possession," under the circumstances that the mortgagee in possession had received the rents and sold, and the real question is, what, under such circumstances, is the proper form of account to be adopted on an order for the "usual account against a mortgagee in possession?"

Now, there is very little to be found upon the subject in the books; the first question, then, I must consider is, what is the principle? Every mortgagee who sells and receives the purchase-money is liable for wilful default if he does not receive what he might have received by due diligence; so is any ordinary trustee. Therefore the only point is whether you ought to make a decree against him for wilful default without wilful default being charged against him on the pleadings and proved at the trial; because, if the charge is proved at the trial, there is no doubt what the proper form of decree ought to be.

I will here say a word upon the case of *Job v. Job* (1) which was recently before me and which, I understand, has led to some misapprehension. I there said that in an administration action an order charging an executor with wilful default may be made at any time during the progress of the action. Now an order charging an executor with wilful default could not be made unless he was so

(1) 6 Ch. D. 562.



charged in the pleadings: therefore the charge, unless originally pleaded, must be introduced by amendment—that is, of course by amendment at any stage of the action at which amendments may be made, that is, before judgment. The general rule is that in every case an order charging wilful default must be based upon a charge of wilful default in the pleadings.

There has, however, been always one exception to that rule, namely, in the case of a mortgagee in possession. You always make a decree against him of wilful default in respect of rents and profits, though no charge of wilful default has been made on the pleadings and there has been no proof of it at the trial. That is the exception to the general rule. On what principle does that exception depend?

Now upon that one may refer to the books to see, first, what is the extent of the exception to the general rule, and, secondly, what is the supposed reason on which the exception is founded. One reason, perhaps, formerly was that the Court looked with less favour on a mortgagee, who though a trustee, derives a benefit from his trust, than on ordinary or gratuitous trustees who receive no remuneration for their duties. I will first of all refer to the text-books.

In *Seton* on Decrees (1) only two forms are given of a decree against a mortgagee in possession, but neither of them relate to the case of a sale by the mortgagee; they do not therefore throw much light upon the subject. But on referring to Mr. *Fisher's* very learned work on Mortgages, I find he says this (2): “The account usually directed against the mortgagee in possession either of tangible property or of a business is of what he has, or without wilful default might have, received from the time of his taking possession.”

The rule as so stated covers the case before me. It covers tangible property or the goodwill of a business, the mortgagee being liable to account for what without wilful default he might have received from the time of his taking possession. Mr. *Fisher's* statement of the rule is quite general, and would, in my opinion, be sufficient to decide the case even if it stood alone; but there are two authorities which seem to me to be conclusive on the point:

(1) 3rd Ed. pp. 366, 367.

(2) 3rd Ed. vol. ii. p. 943.

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one of them is *Williams v. Price* (1), before Sir *John Leach*. There a debtor who was entitled to a judgment debt assigned it to his creditor by way of mortgage. By the creditor's wilful default, he having sued out execution, but omitted to enforce it, the debt ultimately became lost, and the question was whether the creditor ought to be responsible for the loss. Sir *John Leach* says this (2): "Here the creditor, by suing out execution, assumed, as it were, the possession or control of this judgment in exclusion of the assignor, and is within the principle which charges the creditor in possession of property held by him as a security, not only with what he actually receives, but with what he might have received but for his wilful default or neglect."

Here, then, I have the principle stated by a learned Judge of great experience, namely, that where a creditor has the control of a security he is chargeable with what he might have received from it but for his wilful default.

The only other case to which I think it necessary to refer—no authorities have been cited to me—is *Lord Kensington v. Bouverie* (3). There Lord Justice *Turner* says (4), "No special case of wilful default is made by this bill, and this Court, as I apprehend, never directs an account of what, without wilful default, might have been received, otherwise than upon a special case made for the purpose, except in the case of a mortgagee in possession." And further on he says (5), "A mortgagee, when he enters into possession of the mortgaged estate, enters for the purpose of recovering both his principal and interest, and, the estate being, in the eye of this Court, a security only for the money, the Court requires him to be diligent in realizing the amount which is due, in order that he may restore the estate to the mortgagor, who, in the view of this Court, is entitled to it. It is part of his contract that he should do so."

It appears to me, therefore, both on principle and authority, that the proper form of account against a mortgagee in possession who has sold is, an account of the proceeds of sale received by him or by his order or for his use, "or which without his wilful default

(1) 1 S. & S. 581.

(2) *Ibid.* 587.

(3) 7 D. M. & G. 134.

(4) *Ibid.* 156.

(5) 7 D. M. & G. 157.

*1 June 1857*  
*1 June 1858*  
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might have been so received." The minutes as given out by the Registrar must therefore stand, but it should be clearly understood that the account is to be limited to the proceeds of the sales, and does not entitle the Plaintiff to impeach or question the propriety of the different sales, or the adequacy of the amounts for which the properties were sold.

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—

Solicitors: *R. J. Woodfin ; W. M. Miller.*

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## ROWBOTHAM v. DUNNETT.

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[1876 R. 227.]

Feb. 4, 5;  
March 19.*Will—Secret Trust—Charitable Purposes—Tenants in Common.*

A testatrix devised real estate to two persons, their heirs and assigns, as tenants in common, for their personal use and benefit, without any restriction, trust, or condition whatever. One of the devisees was a mere acquaintance of the testatrix, and the other was her solicitor, who prepared her will and to whom she expressed her intention of leaving her property to charitable purposes. The solicitor informed her that such a devise would not be legal, and this absolute gift was then executed. No undertaking, express or implied, was given by the devisees to accept a charitable trust, though the testatrix probably expected that the devisees would apply the property to some good and useful, but not necessarily charitable, purpose:—

*Held*, that whatever might have been the wish or expectation of the testatrix, the devisees were not bound by any secret trust to carry out such intention, but were free to dispose of the property as they pleased; and an action claiming to have the devise declared void was dismissed.

One of the devisees had no intimation during the life of the testatrix that she had devised property to him:—

*Held*, that the gift to him, as one of two tenants in common, would not have been void even if a secret charitable trust had been proved with regard to the other devisee, though it would have been so in the case of joint tenants.

Statement.

*ROSINA ROWBOTHAM*, by her will, dated the 20th of September, 1866, appointed the Defendants, *Daniel Dunnett*, a solicitor, and *John Minors*, gentleman, her executors; and, after giving certain specific legacies, she bequeathed all the residue of her personal estate to the Defendants, upon trust to convert the same into money, and to pay the whole of such money, or such part thereof as might be legally bequeathed for charitable purposes, to the treasurer for the time being of the *Royal Society for the Prevention of Cruelty to Animals*, and she directed such portions of her personal estate as could not be legally bequeathed for charitable purposes to be added to and disposed of with the proceeds of her real estate as thereafter mentioned. And the testatrix devised all her real estate to the Defendants, their heirs and assigns, upon trust to sell the same, and out of the moneys arising therefrom,



and also any portion of the moneys arising from her residuary personal estate not available for charitable purposes, to pay her debts and legacies; and as to the residue of the moneys to arise as aforesaid, the testatrix bequeathed the same to the Defendants, *D. Dunnett* and *J. Minors*, in equal shares, not in their character of trustees or executors, but for their own respective personal use and benefit absolutely, without any trust, restriction, or condition whatsoever, and to be vested interests in them immediately after her death. And the testator declared that it should be lawful for the Defendants, out of the moneys which should come to their hands by virtue of the trusts of her will, to reimburse themselves all costs, charges, and expenses which they should pay or sustain in the execution of the trusts of her will; and in particular, she directed that the Defendant *D. Dunnett* should, in case of his acceptance of the trusts, be the solicitor to her said trust property, and as such, notwithstanding his acceptance of the trusteeship, should be allowed all professional charges which, if employed as solicitor to her trustees, not being himself a trustee, he would be entitled to make.

The testatrix died on the 4th of May, 1870, and was then seised and possessed of real estate of considerable value, and possessed of personalty consisting as well of pure personalty applicable to charitable purposes, as of mixed personalty not so applicable.

The statement of claim was to the effect that the testatrix had few near relations, and it was her wish, often expressed, that the whole of her property, both real and personal, should at her death be applied for charitable purposes. Some time prior to the date of the will the testatrix gave instructions to *D. Dunnett*, who was her solicitor, to prepare a will for her, by which the whole of her property should be disposed of for charitable purposes, but he explained to the testatrix that such part of her property as consisted of real estate and of personal estate savouring of the realty could not be so applied; and after many interviews and conferences it was finally arranged between the testatrix and *D. Dunnett* that the testatrix should devise and bequeath the residue of her property, both real and personal, to *D. Dunnett* and to the Defendant *J. Minors*, who was only slightly known to the testatrix, but was a friend and client of *D. Dunnett*, in manner hereinbefore men-

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tioned, and that they should hold the same upon trust for charitable purposes; that the Defendant *D. Dunnett* communicated the aforesaid arrangement to *J. Minors*, and he approved thereof and assented thereto, and the will of the testatrix was prepared accordingly by *D. Dunnett*; that when the testatrix executed her will and bequeathed the residue to the Defendants in manner aforesaid, she intended that it should not be applied by them for their own benefit, but for charitable purposes, and the Defendants, either by words directly, or by signs or silence indirectly, led the testatrix to believe, and she did believe, that her intentions would be carried into effect, and that unless the testatrix had believed the Defendants would apply the property so devised and bequeathed to them for charitable purposes, and not for their own benefit, the residuary devise and bequest in their favour would not have been contained in the will of the testatrix; and this was well known to both the Defendants, and the devise and bequest was accepted by them, either expressly or tacitly, on that footing.

The Plaintiff *Thomas George Rowbotham* was the heir-at-law of the testatrix, and the Plaintiff *James Stevens* was the legal personal representative of *John Edward Stevens*, deceased, who was one of the next of kin of the testatrix living at her death.

The Defendants had sold all the real estate of the testatrix, and they had converted into money all her mixed personal estate; they had paid all her debts and legacies, but they held the surplus with the intention of applying the same from time to time as occasions might be presented, for charitable purposes.

The Plaintiffs claimed to have it declared that the residuary devise and bequest to the Defendants contained in the will of the testatrix, *Rosina Rowbotham*, was made to them upon a secret trust for charitable purposes; and that the Defendants were trustees of the proceeds of the sale of the real estate thereby devised for the Plaintiff *Thomas John Rowbotham*, and of the mixed personalty thereby bequeathed for the Plaintiff *James Stevens* and the other next of kin, or the representatives of such of the next of kin as might be dead (if any); and to have the trusts of the will carried into execution, and the real and personal estate of the testatrix administered under the direction of the Court.

The statement of defence was put in by both Defendants (but *Minors* had since died), and it was to this effect:—

The testatrix never expressed to the Defendants, or to either of them, or to any other person, her wish that the whole of her property, both real and personal, should at her death be applied for charitable purposes, and she never at any time gave instructions to the Defendant *D. Dunnett* to prepare a will for her by which the whole of her property should be disposed of for charitable purposes.

The whole of the legacies and the annuity bequeathed by the will were given entirely upon the suggestion and at the dictation of the testatrix without any suggestion whatever of *D. Dunnett*.

The Defendant *J. Minors* and the testatrix lived all their lives in the same parish, within a little more than a mile of each other; they were in the same position in life, both being landed proprietors, and they were both well acquainted with each other, frequently seeing each other upon parochial business. *J. Minors*, on two different occasions in the seven years which preceded the making of the will, consulted *D. Dunnett* professionally, but *J. Minors* was not further or otherwise a client of the Defendant *D. Dunnett*.

*D. Dunnett* never communicated any arrangement whatever relative to the disposition of the testatrix's property to *J. Minors*, and *J. Minors* did not assent thereto, and the will of the testatrix was not prepared to meet such arrangement. *J. Minors* was never informed of the bequest of the residue in his favour till after the testatrix's death.

When the testatrix executed her will, and bequeathed the residue to *D. Dunnett* and *J. Minors*, she did not intend that it should not be applied by the Defendants for their own benefit, or that the same should be applied for charitable purposes, and the Defendants did not, nor did either of them, by words directly, or by signs or silence indirectly, lead the testatrix to believe, nor did she believe, that her alleged intentions would be carried into effect.

The Defendant *D. Dunnett* explained to the testatrix that her trustee could be bound by no promise, express or implied, to apply any portion of what she gave them for any of the charities

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she had named in her previous will, or for any charitable purposes whatever; that she must understand that they must have the absolute control and disposal of the residue, and that if they chose to put the money in their own pockets they were entirely at liberty to do so. The testatrix replied that she perfectly understood that she could not legally give any part of her real estate, or of the proceeds of sale thereof, for any charitable purpose, that she would give all she could of her personal estate to the *Society for Prevention of Cruelty to Animals*, which she cared most for, and that as to the rest she understood and was quite content that her trustees should apply it to any purpose they thought fit, and she was quite satisfied they would make good use of the money.

Mr. *Dunnett* had also put in an answer to interrogatories, in which he stated that the only suggestion made by him, save as in the statement of defence mentioned, was in a letter dated the 16th of February, 1866, written to the testatrix, containing these words:—

“There is another way by which your wishes may be carried out, that is, by giving your trustees a discretionary power as to the application of the proposed charitable fund. I cannot, however, advise you to adopt this, as it would be treading upon dangerous ground and might open the door for expenditure of your property in litigation. If, however, you should decide upon this course, I should certainly wish and advise that the will be prepared by experienced counsel. The law is so very jealous of land, or money arising from the sale of land, which is the same thing, being given by will to charitable purposes, that every precaution is requisite.”

Mr. *Dunnett* was examined in Court as a witness, and said:—  
 “The testatrix would have given all her property to charity if the law had permitted it, but I told her it would not. I did not give the testatrix to understand that I should apply the trust property in any particular manner. I believe she left the property to me and Mr. *Minors* to do as we liked with, but she impressed no obligation upon us.”

Argument.

*Glasse*, Q.C., and *Bury*, for the Plaintiffs:—

No one can have any doubt upon the facts of this case that the



testatrix gave this property to the two trustees, Messrs. *Dunnett* and *Minors*, for the purpose of being applied for charitable purposes. The first will made by the testatrix seems to have been such as would have been decidedly void. Mr. *Dunnett* told his client that such would be the effect of it, and then he set himself to discover some means of evading the law. He wrote to her, indicating a mode by which she could carry out her intentions, and eventually the scheme suggested for giving the property to trustees with a discretionary power as to its application was carried out. No doubt this scheme was cleverly devised. Mr. *Dunnett* well knew, as he said, that he was treading upon dangerous ground and that every precaution was requisite. He certainly did use every precaution, and the question now is whether he has succeeded in evading the *Statute of Mortmain*. It is perfectly clear that Mr. *Dunnett* is morally bound to apply the property to charitable purposes, and if this is established the case against Mr. *Dunnett* is proved. The co-trustee, Mr. *Minors*, was merely used as a tool. He was no more than a slight acquaintance of the testatrix, and he was evidently not a person to whom she would have given her property absolutely. The facts shew clearly that the testatrix devised the property in full reliance that the devisees would carry out her object and that the trust was tacitly accepted by them, and this brings the case within *Springett v. Jennings* (1), *Jones v. Badley* (2), and *Wallgrave v. Tebbs* (3). An intimation to a devisee of the testator's intentions and wishes to give his property to charity, and an intimation by the testator that he had confidence in his devisee and was satisfied that his wishes would be carried out, was held, in *Russell v. Jackson* (4), to amount to an undertaking to carry out a secret trust. The same principle was applied in the case of *Paice v. Archbishop of Canterbury* (5).

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*J. Pearson*, Q.C., and *Field*, for the Defendants:—

The case against these two Defendants is very different. As regards Mr. *Minors*, there is no evidence to shew that the wishes of the testatrix, whatever they might have been, were ever com-

(1) Law Rep. 10 Eq. 488; Ibid. 6 Ch. 333.

(2) Ibid. 3 Eq. 635.

(3) 2 K. & J. 313.

(4) 10 Hare, 204.

(5) 14 Ves. 364.

*2 June 1883.*

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municated to him. He was not even informed of the devise during the life of the testatrix, and as the two devisees take as tenants in common, Mr. *Minors* cannot be affected by anything that was said to Mr. *Dunnett*. That was laid down in *Tee v. Ferris* (1).

Then, as to Mr. *Dunnett*, it may be admitted that he was aware of what the testatrix's wishes were, and that he may now intend to carry those wishes into effect, but that is not sufficient to render the devise void. In *McCormick v. Grogan* (2) the testator left his property to Mr. *Grogan* absolutely, and also left him a letter which contained instructions, but asked for no consent from Mr. *Grogan* as to any disposal of the property, and there it was held that there was not any trust created which was binding upon the devisee.

The words of the will in this case are distinct, and parol evidence cannot be admitted for the purpose of explaining the testatrix's intention: *Irvine v. Sullivan* (3). If there was any trust intended it is not binding upon either of the devisees.

*Glasse*, in reply.

Judgment.

March 19. MALINS, V.C. :—

The question to be determined in this case is, whether the testatrix gave her residuary estate to the two Defendants for their own benefit, or upon a secret trust for charity. The question relates to property, the produce of real estate as I understand it, of the value of £6000 or £7000. The Plaintiffs sue as next of kin, and heir-at-law of the testatrix, and they contend that although the gift to the Defendants was in terms absolute, it was in fact intended by her to be applied to charitable purposes, and that the Defendant *Dunnett* either undertook or tacitly led the testatrix to believe it would be so applied.

[His Lordship then read the will and the statement of claim and of defence, and continued :—]

Upon the facts it is clear that the Defendant *J. Minors* never

(1) 2 K. & J. 357. 2 *Kn. 1.807* (2) Law Rep. 4 H. L. 82.  
 (3) Law Rep. 8 Eq. 673.

knew that the testatrix had made any bequest in his favour until after her death, and he could not, therefore, have entered into any engagement with her, either express or implied, as to the application of the property. It is perfectly clear from the evidence that he knew nothing of the will until after the death of the testatrix; nor had he at any moment of his life, the slightest expectation that he would benefit by her bounty. The case on this point is precisely the same as *Tee v. Ferris* (1). It is this exact case. Here, it may be observed, the residue was given to Mr. *Dunnett* and Mr. *Minors* as tenants in common. Communications to one of two devisees which might affect the other, if a joint tenant, cannot affect the other of two tenants in common. In the case of *Tee v. Ferris* I have made a short note of what I consider the point: "There being a communication of the intention to one of four tenants in common that charity was intended, his silence amounted to an acceptance of the trust, and rendered the devise to him void, but did not affect the three-fourths, there being no communication to the other three tenants in common."

It is clear upon that authority, as upon principle, that the bill as against Mr. *Minors* in this case must be dismissed, because he knew nothing of the will, and received no communication; the testatrix did not even tell him she was going to make him executor or residuary legatee, or devisee; therefore he finds the property after her death bequeathed to him, and no trust is expressed; it is given to him absolutely, and he is entitled to treat it as an absolute gift to him for his own benefit, as the will states it to be.

As regards the Defendant *D. Dunnett*, the question depends upon whether he expressly or impliedly led the testatrix to believe that the property would be applied by him to charitable purposes. If he did, then there is a resulting trust for the heir-at-law as to the real estate, and for the next of kin as to the impure personal estate. The rule applicable to the subject is correctly, or, as Lord *Cairns* expressed it, "felicitously," laid down by Lord *Hatherley*, then Vice-Chancellor *Wood*, in *Wallgrave v. Tebbs*. The Vice-Chancellor says this (2): "Where a person knowing that a testator in making a disposition in his favour intends it to be applied for purposes other than his own benefit, either expressly promises or by silence implies that he will carry the testator's intention into

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(1) 2 K. & J. 357. 2 *Jm* 45807 (2) 2 K. & J. 321, 322.

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effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust, and in such a case the Court will not allow the devisee to set up the *Statute of Frauds*—or rather the *Statute of Wills*, by which the *Statute of Frauds* is now, in this respect, superseded; and for this reason—the devisee by his conduct has induced the testator to leave him the property, and as Lord Justice *Turner* says, in *Russell v. Jackson* (1), no one can doubt that if the devisee had stated that he would not carry into effect the intentions of the testator the disposition in his favour would not have been found in the will. But in this the Court does not violate the spirit of the statute, but for the same end—namely, prevention of fraud—it engrafts the trust on the devise, by admitting evidence which the statute would in terms exclude, in order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it. But the question here is totally different. Here there has been no such promise or undertaking on the part of the devisees. Here the devisees knew nothing of the testator's intention until after his death"—that is, as I said, Mr. *Minors'* case. "That the testator desired, and was most anxious, to have his intentions carried out is clear. But it is equally clear that he has suppressed everything illegal." The great object of the testator in the case before the Vice-Chancellor of *Wallgrave v. Tebbs* (2) was charity, and no doubt he gave the bequest expecting it to be applied to charitable purposes. But he says, "He has abstained from creating, either by his will or otherwise, any trust upon which this Court can possibly fix. Upon the face of the will, the parties take indisputably for their own benefit." Then with regard to this particular case, he concludes his judgment by stating that "the statute prevents the Court from looking at the paper writing in which the testator's intentions are expressed, and the parties seeking to avoid the devise have failed to shew that, during the testator's lifetime, there was any bargain or undertaking between the testator and the devisees, or any communication which could be construed into a trust, that they would apply the property in such a manner as to carry the testator's intentions into effect. The devise, therefore, is a valid devise, and the bill must be dismissed." In that case it was a bill seeking to make them trustees.

(1) 10 Hare, 204.

(2) 2 K. &amp; J. 313.

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A case of the same kind (and a very remarkable case) is *Lomax v. Ripley* (1). It does not seem to have been cited, although it was decided before the decision of the Vice-Chancellor in *Wallgrave v. Tebbs* (2); whether it had not been reported at that time I do not know, and the reports do not give you the means of knowing. It was a case which occupied much time and attention. There the testator, being possessed of more than £100,000, desired to found a charity at *Lancaster*. He was told he could not do this by his will, and therefore he gave all his residue to his wife absolutely. He gave his will to her, and at the same time gave her a letter and a sealed packet. He afterwards opened that sealed packet, even in the presence of his wife. He made an alteration in the letter, communicated that alteration to his solicitor, but the wife was not told the contents of the sealed packet or of the letter. The wife knew perfectly well what her husband's views were, and he knew perfectly well what her views were, and that she would certainly carry into effect his intentions after his death, but there was no communication to her. After his death, the letter being opened on the day of the funeral, it was then found what the object was. On that ground there was a contest about it. I was counsel in the case, and the leading counsel of the day were in it. The contention of the Plaintiff entirely failed, because although the Court (the Vice-Chancellor *Stuart*) was perfectly satisfied as to what the object of the testator was, there was no understanding on the part of the widow during his lifetime. However, she most religiously carried his intention into effect after his death, as may be seen at *Lancaster*, where the lady afterwards founded a charity, and I believe anybody who knows the town of *Lancaster* knows the *Ripley Charity*.

Now, the rule which was laid down by Lord *Hatherley* in the case I have cited was adopted and acted upon in the case of *Jones v. Badley* (3), overruling the decision of the Master of the Rolls (Lord *Romilly*). There the testatrix devised the residue of her real estate not applicable under her will to the purpose of mortmain to *A.*, and *B.* his son, as joint tenants. A bill was filed impeaching the devise to *A.* and *B.*, on the ground that the testatrix had made

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(1) 3 Sm. & Giff. 48. *4 Sm 45272* (2) 2 K. & J. 313. *2 Sm 4583*.  
 (3) Law Rep. 3 Ch. 364.

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the devisees to them on a secret trust for charitable purposes, and it was held that the onus lay upon the Plaintiffs to shew that a trust for charity was communicated to, and expressly or tacitly accepted by, the devisees, and that the Plaintiffs had failed upon the evidence to make out this case. The decree of the Master of the Rolls was reversed. Lord *Cairns* there stated the rule as I have done, and as laid down by Vice-Chancellor *Wood*, and says: "The law applicable to the case being therefore free from doubt, we have to examine the facts, for the purpose of ascertaining the answers to two questions. First, did the testatrix, so far as her own mind and intention were concerned, devise her residue to the Messrs. *Badley* in order that they might take, not beneficially, but as trustees for the accomplishment of some charitable purpose? And secondly, if the first question is answered in the affirmative, was her mind and intention in this respect made known before her death to the Messrs. *Badley*, or either of them, and was the devise accepted by them, or either of them, expressly or tacitly on this footing?" The property in that case was very large. "As to both these questions the onus of establishing the affirmative must be upon the Plaintiffs." Then his Lordship commented at length on the evidence, and said: "On the whole, I am of opinion that, whatever charitable desire or object may have existed in the mind of the testatrix when she made this devise of the residue, the Plaintiffs have entirely failed to shew that any secret trust for charity was communicated to, much less accepted or acquiesced in by, the Defendants or either of them. I am of opinion that the decree must be reversed and the bill dismissed. I assume that in such a case no costs will be asked for."

Finally, the same principle was acted upon by the House of Lords in the case of *McCormick v. Grogan* (1). There the facts were these: The testator, several years before his death, had made his will in favour of a friend, Mr. *Grogan*, having very many near relations. He was seized with cholera, and on the day of his death—a few hours, indeed, before his death—he sent for Mr. *Grogan* and told him he had made a will in his favour, and that he would find a letter in a particular drawer. Mr. *Grogan* said he did not know where the drawer was. The testator was a large

(1) Law Rep. 4 H. L. 82.

merchant who had a number of clerks, and he said, "My clerks will tell you," and accordingly in the drawer was found a letter expressing the wish of the testator as to various dispositions which he said were not to be obligatory on Mr. *Grogan*, and Mr. *Grogan* never saw the letter in the lifetime of the testator. When he was told by the testator, "I have made my will, and given you everything," he said, "Can that be right?" The testator said, "Yes, I will not have it otherwise." The result was that Mr. *Grogan* took all the property. He seems to have been treated by the House of Lords with the greatest possible respect, as a man acting with great probity in the matter, in carrying out the wishes of the testator in this letter, which was not binding upon him. He gave nothing to Mr. *McCormick's* relations; he refused to give anything to them, for reasons which were no doubt best known to himself; and the question was, whether, under those circumstances, he was bound by the terms of the letter. The decision proceeds on the same ground as the other case to which I have referred, of *Lomax v. Ripley* (1), that although there was a wish on the part of the testator that certain things should be done, that wish had not been communicated by the testator to the legatee in the lifetime of the testator, there was no undertaking to fulfil them expressed or implied by assent, undertaking, or by silence giving such assent, and therefore it was held that Mr. *Grogan* was in no way bound, and was perfectly at liberty to dispose of the property as he thought fit. In *Russell v. Jackson* (2), which was most relied upon by the Plaintiffs, the intention of the testatrix to give the property for charitable purposes was actually communicated to the devisees, and Sir *George Turner* was satisfied that they had undertaken the trust, and that the property would not have been given to them if they had not done so. Therefore the trust was binding upon them, and rendered the devise to them void, the property not being capable of being given to charity. In *Springett v. Jennings* (3), also relied upon by the Plaintiffs, the testatrix conveyed the lands in question to charitable purposes. She had actually executed a deed devoting them to charitable purposes, but having died within a year after the execution of the deed, it became void. But, to

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(1) 3 Sm. & Giff. 48. *Am. L. S. J.* (3) Law Rep. 10 Eq. 488; Ibid. 6
 (2) 10 Hare, 204. Ch. 333.

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meet that contingency, she devised the property comprised in the deed to two of the three trustees appointed by it. She had frequent conversation with one of them (they were joint tenants there, which makes a marked difference) on the subject of the charity. It was held that he had not been asked to promise, and had made no promise. Lord *Romilly* was satisfied that the testatrix was induced by silence to believe that he would carry out her wishes.

In the present case there is one point which I ought to have adverted to. I have cited several cases in which letters were written, not communicated in the lifetime of the testator, and wherever a letter was written or a verbal communication was made to the devisee in the lifetime of the testator, implying that the trust was to be created, and the legatee assents to that, he is bound; but the remarkable feature in this case is, that, on the day on which the will was made, the testatrix added these words by way of precaution, which are, I understand, in the handwriting of one of Mr. *Dunnett's* clerks, and were drawn up by Mr. *Dunnett* himself and signed by the testatrix: "Whereas, by my will, bearing even date herewith, I have bequeathed to Mr. *Daniel Dunnett* and Mr. *John Minors*, in equal shares, the residue of the moneys arising from the sale of my real estate, for their own use and benefit absolutely, and without any trust, restriction, or condition, and I have made this bequest to enable the said *Daniel Dunnett* and *John Minors*, if they shall think fit, but not otherwise, to benefit the funds of certain public institutions in which they are aware I take an interest, but I hereby expressly declare that I have not imposed any secret trust or confidence upon the said *Daniel Dunnett* and *John Minors* in regard to such institutions, nor have they or either of them given me any express promise or assent to devote the whole or any portion of the moneys so bequeathed to them for the benefit of such public institutions or any of them, and I declare that, with regard to the application of the moneys so bequeathed to the said *Daniel Dunnett* and *John Minors*, it is my wish and intention that they should have the most entire and uncontrolled discretion, and I have made this declaration for the purpose of explaining fully my intentions with regard to such bequest in case any of my relations should call the same in question, and to shew that I am fully aware of the disposition I have made, and that there is no legal

obligation on the part of the said *Daniel Dunnett* and *John Minors*, or either of them, to apply any part of the moneys bequeathed to them otherwise than as mentioned in my said will." Therefore, on the face of the will, the property is given absolutely, and it is positively sworn by Mr. *Dunnett* that no undertaking whatever, express or implied, was entered into, and there is this document which says expressly she does not intend to create a trust. Of course it cannot be read as part of the will, but, so far as it goes, it bears out what in other respects has been stated.

In the present case, therefore, upon consideration of the whole evidence and circumstances, I am satisfied that, although the testatrix hoped and believed that the Defendants would apply the property given to them in a manner consonant with her views and wishes, she did not impose any obligation upon them. She expected, as Mr. *Dunnett* states, that they would apply the property to some good and useful, but not necessarily charitable, purpose, or, as he states in his examination, which I have read, "She left the property to me and Mr. *Minors* to do as we liked with, but imposed no obligation upon us." I am therefore of opinion that the action must be dismissed as against Mr. *Dunnett* also.

I do not know what is suggested with regard to costs. There is the passage in Lord *Cairns'* judgment—"I assume in such a case costs will not be asked."

J. Pearson, Q.C., pressed for costs.

MALINS, V.C.:—

I am bound to say that the case, to use an ordinary expression, is one that runs as close to the wind as any I have ever seen. It is a very difficult case, and one that demanded inquiry. Under the circumstances, therefore, I will dismiss the action without costs. The executors will have their costs out of the estate, and I am afraid the Plaintiffs will have to bear their own costs. I would give them costs if I could, but if not assented to I cannot do so.

Solicitors for Plaintiffs: *Young & Thompson*.

Solicitors for Defendants: *Field, Roscoe, & Co.*

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Bankers—Partnership Accounts—Accounts of individual Partners—Equitable Mortgagee—Right of Foreclosure, not Sale.

Where accounts are kept at a bankers by a firm, each partner having a right to draw cheques, and also by the individual partners of the firm, it is not the duty of the bankers to inquire into the propriety of any transfer of funds which may be made from and to the different accounts.

Upon the death of one partner in a firm having an account at a bankers, the surviving partner has a right to draw cheques upon the partnership account.

The right of an equitable mortgagee by deposit of deeds without a written memorandum is a decree of foreclosure, not sale. (1)

Statement.

THE Plaintiffs, *J. Backhouse & Co.*, were bankers at *Middleborough*. The Defendant, *Robert Hedley Charlton*, was a customer of the bank, and in May, 1874, he had £7962 standing to the credit of his account at the bank. At that time the Defendant was about to purchase certain messuages, lands, works, and premises known as the *Stranton Iron and Steel Works*, for £28,000, and he applied to the Plaintiffs to allow him to overdraw his account to an amount sufficient to enable him to purchase the said works, and they agreed to do so on the title deeds of the works being deposited with them to secure the Defendant's current account. The works were purchased by the Defendant, and his account at the Plaintiffs' bank was overdrawn to the amount of £20,293 12s. 9d.

The Defendant had ever since continued to be largely indebted to the Plaintiffs on his current account, and they had recently closed the said account current by a notice in writing, and at that time the Defendant's account was overdrawn to the amount of £36,000 and upwards.

The Plaintiffs now claimed to be paid what was due to them by the Defendant, or in default thereof that the Defendants might be foreclosed from all equity of redemption in the mortgaged premises, and might be ordered to convey such premises to the Plaintiffs; or otherwise that the premises might be sold and the proceeds applied in payment of the principal, interest, and costs due to the Plaintiffs.

(1) But see *York Union Bank v. Ayley* 11 Ch D 205 (1882)

The Defendants, including the trustees under the will of *Thomas Charlton*, the father of the Defendant, alleged that part of the £7962 standing to the current account of *R. H. Charlton* at the time of the advance made by the Plaintiffs belonged to the trust estate of his father, *Thomas Charlton*, deceased, and that the Plaintiffs well knew that such was the case. They alleged that the charge of the Plaintiffs upon the *Stranton Ironworks* was, under the circumstances, subject to a lien in favour of the trust estate of *Thomas Charlton* for the amount of such estate invested therein.

The witnesses examined *vivâ voce* at the hearing were the principal partner in the Plaintiffs' bank and their manager at *Middlesborough*. They stated that they were not aware till long after the advance was made by the Plaintiffs' bank to *Robert Hedley Charlton*, that he was one of the executors and trustees of his father's will. There was an account at the bank in the names of *Thomas Charlton & Co.*, the company being constituted of three persons, *Thomas Charlton*, the father, *Robert Hedley Charlton*, his son, and *Thomas Ingledew*. The account of *Robert Hedley Charlton* was opened with the bank in October, 1872, immediately before the death of *Thomas Charlton*, the father, which took place on the 30th of November, 1872. There was also an account opened at the bank in the names of the trustees of *Thomas Charlton*, the father, who were his three sons, in February, 1876, and there was a further account entered in February, 1876, in the names of *Robert Hedley Charlton* and *Thomas Charlton*, the son, who were partners.

Robert Hedley Charlton from time to time transferred funds from the account of the firm of *Charlton & Co.* to his own private account—that happened during the life of the father. Either of the partners could draw on the account. The witnesses were not aware that any or either of the three sons of the testator employed the trust assets for his own purposes. There was no written memorandum upon the deposit of the title deeds of the *Stranton Ironworks* with the Plaintiffs.

J. Pearson, Q.C., and *B. Rogers* (*Southgate*, Q.C., with them), for the Plaintiffs :—

The bankers cannot be held responsible for the manner in which

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the money was drawn out by the different partners in this firm or by the trustees of the will of *Thomas Charlton* the father. There was the account of the partnership of *Charlton & Co.*, and there were the separate accounts of the sons and the account of the trustees, and all the parties in whose names the accounts stood had power to draw upon those accounts, and the bankers could not know whether the cheques were properly drawn on the different accounts, and could not refuse to honour those cheques; and even supposing cheques were drawn upon the account of the partnership of *Charlton & Co.* after the death of *Thomas Charlton*, that would make no difference to the liability of the bankers, since it is well established that the surviving partners in a firm have a perfect right to draw upon the partnership account.

It is submitted that we are now entitled to a decree of foreclosure in respect of the *Stranton Ironworks*, of which there was an equitable mortgage by deposit of deeds. That we are entitled to foreclosure, and not sale, is settled by the case of *James v. James* (1); and whether there is or is not a memorandum in writing accompanying the deposit of deeds makes no difference. The old rule in the Bankruptcy Court was, that if you applied for a sale and you had a memorandum, you had the costs, and if you applied for a sale and had no memorandum, you did not get the costs. That is the only difference. There might have been a question upon this point before the case of *James v. James*, but that decision has been approved of and acted upon ever since, as it was founded upon a decision of the Court of Appeal in *Pryce v. Bury*, not reported, but copied from the Registrar's book. A written memorandum is no higher than a parol agreement, because mortgage is only parol put on paper. Therefore the decree we are entitled to is foreclosure, not sale.

Higgins, Q.C., and *Caldecott*, for the Defendants, the *cestuis que trust* under the will of *Thomas Charlton*:—

We submit that the Plaintiffs, from their intimate acquaintance with all the *Charltons*, must have known the position in which *Robert Hedley Charlton* stood in respect of his father's property, and they must be taken to have had notice that the assets of the

(1) Law Rep. 16 Eq. 153.

testator were being dealt with by the sons as trustees, and there being separate accounts of the different parties, the transfers from one account to the other were proper subjects for inquiry and investigation on the part of the bankers. It was their duty to inquire, and they ought to be held to have had notice of the fact that the assets which were being dealt with were trust assets.

Then we submit that the proper relief in respect of the *Stranton Ironworks* is sale and not foreclosure. All the cases are cited in *Fisher on Mortgages* (1).

[*Morgan, Q.C., amicus curiæ*, referred the Court to the case of *Samble v. Wilson* (2), on the question as to whether a mortgagee with a deposit merely, and without any written memorandum, is entitled to foreclosure or sale. The Master of the Rolls there decided that the mortgagee who was desirous of having a sale could not get it except by consent.]

In the case of *Matthews v. Goodday* (3) Vice-Chancellor *Kindersley* discussed the subject at some length, and the Vice-Chancellor there said his own opinion would be that there would be no right upon the mere deposit of title deeds, and nothing more, to come and ask for a legal mortgage.

The case of *James v. James* (4) was cited before the present Master of the Rolls in *Carter v. Wake* (5). There his Lordship decided that the doctrine that an equitable mortgagee by deposit of title deeds is entitled to foreclosure does not extend to a pledge of personal chattels; and in the case of *Marshall v. Shrewsbury* (6), where the point was incidentally raised, Lord Justice *James* says this: "I have never met with a bill by an equitable mortgagor for redemption, though such a bill might probably be filed. But how could the dismissal of such a bill operate as a decree for foreclosure? The only thing foreclosed would be the right to redeem certain pieces of parchment. It may be that the Plaintiff would be barred from bringing another bill to redeem those pieces of parchment, but that is all. When an equitable mortgagee files a bill to enforce his security, he does not get a simple decree for

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(1) 3rd Ed. pp. 509, 510.

(2) 5 N. R. 395.

(3) 8 Jur. (N.S.) 90.

(4) Law Rep. 16 Eq. 153.

(5) 4 Ch. D. 605.

(6) Law Rep. 10 Ch. 250, 254.

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foreclosure, but he gets further substantial relief. He is entitled to have a declaration that his deposit operated as a mortgage, and that in default of payment of what shall be found due the mortgagor is a trustee of the legal estate for him, and then the decree goes on to order the mortgagor to convey the estate to him." Our case is that there was a dealing with the trust estate wholly unauthorized by the trustees. It is clear that any inquiry would have led the Plaintiffs to the information which we impute to them, and it is submitted that they had constructive notice of facts which, if they knew, would prevent them from being entitled to any decree except upon condition of recouping to the trust estate the sums of money in respect of which the mortgagor was accountable to the trust estate. The only question therefore is, whether there was constructive notice, or express direct notice, to the Messrs. *Backhouse*.

Procter, for the trustee in bankruptcy of *Robert H. Charlton*, did not oppose a foreclosure decree.

Watson, for the trustees of the estate of *Thomas Charlton & Co.*

Judgment.

MALINS, V.C. :—

At the time this advance was made by the Plaintiffs in 1874, *Thomas Charlton*, the father of *Robert Hedley Charlton*, was dead. He had died on the 30th of November, 1872. *Robert Hedley Charlton* had been in partnership with his father, *Thomas Charlton*, in very extensive business transactions. He was the surviving partner, and there was with Messrs. *Backhouse & Co.* a continuing account of the firm of which *Thomas Charlton*, the father, had been a member. It is perfectly clear, therefore, that *Robert Hedley Charlton*, as the surviving partner, had a right to draw upon that account, and that Messrs. *Backhouse*, if they had no notice of the state of the accounts between the estate of the deceased partner and the surviving partners, were under no obligation whatever to make an inquiry on the subject. I find that there were in the books two accounts—*Thomas Charlton*, the father, had a private account which is not called in question here at all; he also had this account of *Thomas Charlton & Co.* in

which his son was a partner. The surviving partner was entitled to draw upon that account, and I repeat that Messrs. *Backhouse* were not called upon, nor would it have been prudent of them, to make any inquiry—they were bound to give credit to the statement that the surviving partner was a partner until the contrary was shewn. They were therefore, in my opinion, perfectly justified in honouring the cheques of *Robert Hedley Charlton* upon that account, unless they had express notice that some breach of duty was taking place.

It has been distinctly sworn that the Plaintiffs had no notice that *Robert Hedley Charlton* was a trustee of his father's will when this large advance of £20,000 was made. They knew it afterwards, in 1876, but in 1874 they had no knowledge on the subject; therefore the defence so far fails, and I am bound to come to the conclusion that this advance of £20,000 was made in the ordinary course of business, without any knowledge of Messrs. *Backhouse* or their agents that any irregularity was being committed. If I were to assent to the suggestion which has been made on the other side, I should be striking a most severe blow at the business of bankers, which could not be carried on if they were to be affected by such transactions as these. I am therefore clearly of opinion that Messrs. *Backhouse* are entitled to be treated as ordinary mortgagees by deposit of the title deeds of the *Stranton Iron-works*, and that they must have the usual remedies of mortgagees which are here asked for.

But upon the other point raised, namely, the question whether the proper remedy of an equitable mortgagee by mere deposit of title deeds is a sale or foreclosure, upon principle I confess I never was able to see, and I do not see now, why there should be any distinction, because whether it is done by written memorandum or by a deed, they all equally result in a mortgage, and if a mortgage is created in three different ways, I cannot see any reason why the remedy of a mortgagee should not be in any case precisely the same, that is to say, if there is a power of sale it is by sale, if there is no power of sale it is by foreclosure. That would be my opinion on principle, and I am happy to find I am relieved from all difficulty on the subject, because I take it to be now settled by the case *Mr. Osborne Morgan* referred to, *Samble v.*

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V.-C. M. *Wilson* (1). It was there decided by Lord *Romilly* in this way:
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 ——— This was formally brought before the Court in the case of
James v. James (2), where the decision proceeded on the authority
 of a case of *Pryce v. Bury* (3), which was considered to settle
 the question. The short note is this: "This was a bill for an
 account by an equitable mortgagee against the heir-at-law of
 the mortgagor, and for a foreclosure or sale, and the only question
 was whether the Court ought to direct a foreclosure or a sale.
 Mr. *W. W. Karlake*, for the Plaintiff, stated that there were
 numerous cases which were easily reconcilable, but the weight
 of authority seemed to be in favour of Lord *Eldon's* view that
 a foreclosure was relief to which an equitable mortgagee was
 entitled. The Lord Justice *James* read the note from the
 Registrar's book of *Pryce v. Bury* on appeal to the full Court,
 and said that that case was conclusive on the question, as appeared
 by that note, which ought to be reported. Decree for foreclosure
 accordingly." Therefore, here, upon the authority of that case
 and upon mature deliberation, the Court decided that where
 there was a contract—I suppose there was no written memo-
 randum—it does not state there was—upon the mere deposit of
 title deeds a mortgage is created, and the remedy of the mort-
 gagee was foreclosure, if he thought fit to have it, and not sale.
 Now that proceeded upon the authority of *Pryce v. Bury*, which
 was as long ago as 1854, and which resulted in a decree for fore-
 closure. I consider, therefore, it is not necessary to refer to the
 cases cited in *Fisher* on Mortgages, which were cases anterior to the
 publication of his book in 1868, because all that of course has
 been overridden by *James v. James*, which was in 1873. I am,
 therefore, happy to find it is, in my opinion, now perfectly settled,
 certainly in accordance with what would be my view upon the
 subject, that the proper remedy of a mortgagee, whether created
 by a deposit of title deeds with a written memorandum, or without
 a memorandum, or by a deed, is foreclosure. Therefore, Messrs.

(1) 5 N. R. 395.

(2) Law Rep. 16 Eq. 153.

(3) Law Rep. 16 Eq. 153, n.

Backhouse must have, in my opinion, the usual foreclosure decree in this case. It should be prefaced with "It appearing by the evidence that the balance," then there will be a statement of the balance, and the decree will be that the equitable deposit of deeds is a good and valid mortgage against all the parties Defendants to the suit. I think it will be for the benefit of the infants that the accounts should be waived, and as *Mr. Pearson*, for the Plaintiffs, offers to take £36,000 instead of £36,500 2s. 8d. now due, with interest from the 1st of January, 1877, I will make a declaration to that effect.

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1878
BACKHOUSE
v.
CHARLTON.
Judgment.

Morgan, Q.C., said that *Mr. Fisher*, in the last edition of his book (1), after citing the cases before referred to, said, "The right of a deposittee without an agreement to a decree of foreclosure is now well established."

Solicitors for Plaintiffs: *Tathams & Pym*.

Solicitors for Defendants: *Sharp & Ullithorne; Shum, Crossman, & Crossman*.

STACE v. GAGE.

[1878 S. 140.]

V.-C. M.
1878
April 12.

Trustees for Sale—Partition—Cestuis que Trust not necessary Parties.

In an action for sale and partition, the Plaintiffs were trustees for sale of two-thirds of certain leasehold property, and the Defendants were trustees for sale of the remaining third part after the death of a tenant for life. The *cestuis que trust* not being parties:—

Held, that the trustees for sale sufficiently represented their *cestuis que trust*, and a sale and partition were directed without notice to the parties beneficially interested.

THIS case came on as a short cause.

Statement.

Hannah Trindle, by her will, dated the 1st of December, 1857, gave the whole of her leasehold property equally between *Thomas Gage*, *Joshua Gage*, and *Amelia Inseal*, as tenants in common.

The third part given by the will to *Joshua Gage* became vested

V.-C. M.

1878

STACE

v.

GAGE.

Statement.

in *Amelia Inseal*, who, by her will, dated the 31st of October, 1875, gave the two-thirds of the leaseholds to the Plaintiffs, *James Stace* and *Edwin Davis*, upon trust to sell and stand possessed of the proceeds as therein mentioned, and appointed the Plaintiffs executors of her will.

Amelia Inseal died in 1877.

Thomas Gage, who was entitled to the remaining third part of the leasehold property, by his will, dated the 6th of October, 1868, after appointing the Defendants, *J. Gage* and *Charles Pettitt*, executors thereof, bequeathed to his wife, the Defendant, *Mary Ann Gage*, during her life, all his real and personal estate, and after her decease the testator directed his executors to sell all his share in the leasehold premises therein mentioned, being the leasehold premises bequeathed by the will of *Hannah Trindle*, and stand possessed of the proceeds upon the trusts therein mentioned.

Thomas Gage died in 1873.

The Plaintiffs claimed that it might be declared that they were entitled to two-thirds of the leasehold property, and that the Defendant *Mary Ann Gage* was entitled for life, and the Defendants *J. Gage* and *Charles Pettitt* in remainder, to the said remaining equal third part of the premises. That a fair partition might be made between the Plaintiffs and the other persons entitled, and that the leasehold premises might be sold and the proceeds thereof divided and distributed between the Plaintiffs and the other persons entitled thereto.

The question now raised was whether the sale and partition could be effected by the trustees without the other parties interested being before the Court.

Argument.

E. S. Ford, for the Plaintiffs:—

The trustees for sale sufficiently represent their *cestuis que trust*. They must be treated as the actual owners of the property, and it is not necessary to have the parties beneficially interested before the Court. That was decided by your Lordship under the *Settled Estates Act*, in *In re Strutt's Trusts* (1), following a case of *In re Potts' Estate* (2), decided by the Master of the Rolls in 1866.

(1) Law Rep. 16 Eq. 629.

(2) Law Rep. 16 Eq. 631, n.

These cases, however, were not followed by the present Master of the Rolls in *In re Ives* (1).

E. Ward, for the Defendants.

MALINS, V.C. :—

My opinion is that the Plaintiffs, who are trustees of the will of Mrs. *Inseal*, sufficiently represent their *cestuis que trust*, and the order now asked for will no doubt be for the benefit of all the parties interested.

The decree will be in the terms of the claim.

Solicitor for the Plaintiff: *H. J. Godden*.

Solicitors for the Defendants: *Beaumont & Warren*.

V.-C. M.
1878
STACE
v.
GAGE.

Judgment.

TAUNTON v. MORRIS.

[1874 T. 94.]

Married Woman—Equity to Settlement—Life Interest.

V.-C. M.
1878
May 1.

A married woman has the same equity to a settlement out of property in which she has a life interest only as out of property in which she has an absolute interest, and there ought to be no distinction between the two cases as regards the amount to be settled.

14 Ch D 571
518-91

affirmed on appeal 14 Ch D. 779.
A QUESTION arose on a petition in this action as to the amount to be settled on Mrs. *Taunton*, a married woman, under her equity to a settlement, under the following circumstances :—

Statement.

Mr. *Taunton* became insolvent in July, 1861, being then in prison for debt, and was indebted to various creditors to the extent of £25,000; no assets of his estate had been discovered, and no dividend declared. The provisional assignee of the estates of insolvent debtors was the person in whom his estate was vested.

Mrs. *Taunton* became entitled for her life to an income of about £500 a year, with remainder to her children, under the will of her father, the testator in the cause, on the death of the widow of

V.-C. M.

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TAUNTON

v.

MORRIS.

Statement.

the testator in 1876. The testator's will did not settle the income to her separate use.

No settlement or agreement for a settlement had been made upon or since the marriage of Mr. and Mrs. *Taunton*, which took place in 1846.

This suit was instituted in 1874.

The provisional assignee claimed at least half of the wife's income for the creditors of Mr. *Taunton*.

Mrs. *Taunton* claimed to have the whole of the income settled.

Evidence was given that Mr. *Taunton* contributed nothing, and could contribute nothing to the support of his wife.

Money amounting to about a year's income had been paid to Mrs. *Taunton* under an order of the Court for her support, without prejudice to the present question.

Argument.

Glasse, Q.C., and *Langley*, for the provisional assignee:—

The wife might be entitled to the whole if it were a case of capital, but here she is entitled to a life income only, and ought only to have one-half, as children cannot be considered: *Tidd v. Lister* (1); *Beresford v. Hobson* (2); *Vaughan v. Buck* (3); *Wright v. Morley* (4).

J. Pearson, Q.C., and *W. Karlake*, for Mrs. *Taunton*:—

The equity to a settlement is personal to the wife, and therefore attaches to a life interest no less than to an absolute interest; and the tendency of late years has been to allow the wife the whole income in all reasonable cases: *Wilkinson v. Charlesworth* (5); *Scott v. Spashett* (6); *Dunkley v. Dunkley* (7).

A general assignee stands on a different footing from a particular assignee for valuable consideration: *Re Duffy's Trust* (8); *Koeber v. Sturgis* (9); *Lewin on Trusts* (10); *Roper's Husband and Wife* (11).

(1) 10 Hare, 140; 3 D. M. & G. 857. (6) 3 Mac. & G. 599.

(2) 1 Madd. 362. (7) 2 D. M. & G. 390.

(3) 1 Sim. (N.S.) 284. (8) 28 Beav. 386.

(4) 11 Ves. 12. (9) 22 Beav. 588.

(5) 10 Beav. 324. (10) 6th Ed. p. 613.

(11) Jacob's Ed. vol. i. p. 285.

105C 18 Jan 543.

Higgins, Q.C., and *Crossley*, and *H. Fellows*, supported the same view.

Glasse, in reply :—

Tidd v. Lister (1) was not cited in *Koeber v. Sturgis* (2).

The law is altered as to the proportion you may give out of an absolute interest ; it is not altered as to the proportion to be given out of a life income.

The arrears to this date must belong to the provisional assignee and must be accounted for : *Newman v. Wilson* (3).

MALINS, V.C. :—

The provisional assignee has a very small interest, for the dividend to be paid will in any case be very small ; nevertheless I have now to decide whether *Mrs. Taunton* should have the whole or only half of her income settled upon her. *Mr. Taunton's* creditors have never received any money under the insolvency, and will receive nothing unless they can get a small dividend out of *Mrs. Taunton's* share in this suit.

The case of a general assignee differs from that of an assignee for value, for he can only take what the husband could take. The old rule was to give only one-half the income to the wife, as against her husband or his general assignees ; but this has been modified in later years, and the amount has been enlarged so as to give the wife three-fourths, and more lately the whole of the income when the Court considers that she requires it : *Smith v. Smith* (4).

There is no dispute that if this had been corpus and not a life interest only, I could, in my discretion, give the whole of the income to the wife, but it has been strenuously urged that as *Mrs. Taunton* has only a life interest, a different rule applies. But on the reason of the thing I can find no ground for such a distinction, for suppose *Mrs. Taunton* had been entitled to a capital sum of £10,000, I could have appropriated that sum, and ordered it to have been invested so as to give her an income of £500 a year, with remainder to her children, or to her husband's assignees if

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TAUNTON

v.

MORRIS.

Argument.

Judgment.

(1) 10 Hare, 140 ; 3 D. M. & G. 857. *1878* (3) 31 Beav. 34.

(2) 22 Beav. 588.

(4) 3 Giff. 121.

V.-C. M.

1878

TAUNTON

v.

MORRIS.

Judgment.

there should be no children, and why then should I not give her the whole of her income of £500. The distinction between corpus and life estate has no doubt been taken in some cases, but I can see no reason for the distinction, and in my opinion it ought to be done away.

In *Wright v. Morley* (1) Sir *W. Grant* held, referring to *Pryor v. Hill* (2), where it was contended that the equity of the wife did not extend to the case of a life interest, that the wife's life interest passes to the assignees of the husband subject to the ordinary equity to a settlement. If then I might have settled £10,000 so as to give Mrs. *Taunton* £500 a year, with remainder to her children, why should I not give her the £500 a year for her life when the testator has himself given the children the remainder, which I should have otherwise done according to the practice of the Court.

I do not think that later cases have maintained the suggested distinction between a life interest and an absolute interest. Mr. *Lewin*, in his last edition (3), says that upon principle the wife's equity to settlement ought in all cases to be the same, though he goes on to state an exception where the equity is sought to be enforced against the life interest. Countenance has been lent to the existence of such an exception by the remarks of Vice-Chancellor *Turner* in *Tidd v. Lister* (4), where, in my opinion, a broader view might have been taken. But *Wright v. Morley*, *Wilkinson v. Charlesworth* (5), *Scott v. Spashett* (6), and, above all, *Koeber v. Sturges* (7), are authorities to shew that a proper settlement should be made equally out of the life interest as out of the absolute interest of the wife; and Mr. *Jacob*, in his edition of *Roper's Husband and Wife* (8), is of the same opinion, that the wife ought to be allowed a proper maintenance out of her life interest.

Now, therefore, considering this is a question between the wife (who is admitted to be entitled to some equity to a settlement) and the general assignee of the husband, why should I not give her the whole of the income? The wife was married fifteen years

(1) 11 Ves. 12.

(2) 4 Bro. C. C. 139.

(3) 6th Ed. p. 614.

(4) 10 Hare, 140; 3 D. M. & G. 857.

(5) 10 Beav. 324.

(6) 3 Mac. & G. 599.

(7) 22 Beav. 588.

(8) Page 285.

before the insolvency, and she only became entitled in possession to this property in 1876—eighteen years after the insolvency; and under all the surrounding circumstances, I come to the conclusion that she is entitled to have the whole life estate settled on her. And I also hold that her right accrued from the institution of the suit in 1874, and that she is entitled to the arrears of income which I have ordered to be paid out to her for her support.

Solicitors: *Crowdy & Son; Twyford; Petch.*

V.-C. M.

1878

TAUNTON

v.

MORRIS.

ASSOCIATED HOME COMPANY *v.* WHICHCORD.

V.-C. M.

[1877 A. 454.]

1878

May 23.

Third Party Notice—Rules of Court, 1875, Order XVI., r. 17. (1)

The Plaintiffs had purchased property from the Defendant for £14,000, and they claimed in this action to have £2000, part thereof, returned to them.

The Defendant was being sued in the Exchequer Division by persons who claimed the same £2000 as commission moneys.

The Court refused to make an order that the Plaintiffs in the Exchequer Division should be served with a third party notice, or made Defendants to this action, under Rules of Court, 1875, Order XVI., r. 17.

THE *Associated Home Company, Limited*, claimed the sum of £2000 from *Whichcord*, on the ground that £2000, part of £14,000 purchase-money paid him by them for certain property, was commission, and that they were entitled to recover that sum from *Whichcord* on the ground that the sale had been induced by promoters of the company who had conspired to increase the purchase-money, and who could not take any commission, and therefore the company were entitled to recover the £2000.

At the same time persons named *Hancock, Blaikie, and Millar* were suing *Whichcord* in the Exchequer Division to recover the same £2000, as commission due to them, under an agreement that if they brought about the sale of the property, they should have as commission any excess over £12,000.

Boydell, one of the Defendants in this action, also claimed part of the commission for himself.

Statement.

16C/D49

(W. L. M. G. J. 1878. 11. 11.)

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 Statement.

After the pleadings were closed and issue joined, an application was made in Chambers by the Defendant *Whichcord* for leave to serve *Hancock*, *Blaikie*, and *Millar*, who were suing him for the same money as the company were suing him for, with notice of this action, under Rules of Court, 1875, Order XVI., r. 17, which provides that, "Where a Defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action should be determined not only as between the Plaintiff and Defendant, but as between the Plaintiff, Defendant, and any other person, or between any or either of them, the Court or a Judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined," and that a proper order might be made for having the right of the company determined in the presence of the other parties claiming the same £2000.

Argument.

Glasse, Q.C., and *E. Cutler*, for the motion:—

Whichcord is sued by different persons in different Courts for the same thing, and all the claims should be tried in this action: *Child v. Stenning* (1). The Plaintiffs in the Exchequer ought to be here, in order to see that the defence of *Whichcord* in this action is properly conducted. They may, if they choose, on having notice, intervene actively and assist in defending the action: *Pearson v. Lane* (before Mr. Justice *Quain* in Chambers, Dec. 8, 1875), *Turner v. Hednesford Gas Company* (2).

[MALINS, V.C.:—I should think the right course would be to have the proceedings stayed in the Exchequer Court until this action is decided; for if the Plaintiffs succeed here, the action in the Exchequer Court must fail.]

Such an application has been made to Mr. Justice *Lindley*, and he is willing to stay execution, but then all the expense will have been incurred.

[MALINS, V.C.:—The question of costs will make a difficulty: will *Whichcord* indemnify the company against the extra costs?]

! (1) 5 Ch. D. 695.

(2) 3 Ex. D. 145.

1875 1876 (1875) 248

Such indemnity has never been ordered to be given in any of the cases decided upon this rule: *Ex parte Smith* (1); *Treleven v. Bray* (2); *Benecke v. Frost* (3).

Burrell, for the Defendant *Boydell*.

Higgins, Q.C., and *Lemon*, for the Plaintiffs, were stopped by the Court.

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WHICHCORD.

MALINS, V.C., after stating the circumstances, continued:—

Judgment.

If this Court decides that the company are entitled to recover the £2000, and to reduce the purchase-money to £12,000, the Plaintiffs in the Exchequer Court can get nothing, for they are by agreement to have as commission the excess over £12,000. But I do not see why the Plaintiffs here should be embarrassed with any question between the Defendant *Whichcord* and other persons. I think it is unreasonable that they should be encumbered with four Defendants. As a matter of principle, and in the exercise of my discretion, and following the authority of *Bower v. Hartley* (4), I refuse the application.

Solicitors: *Monckton, Long, & Co.*; *Longcroft & Myers*; *Radford*.

(1) 2 Ch. D. 51.

(3) 1 Q. B. D. 419.

(2) 1 Ch. D. 176.

(4) *Ibid.* 652.

V.-C. B.

1878

May 4.

In re CROUGHTON'S TRUSTS.*Married Woman—Separate Use—Restraint upon Anticipation—Bequest of Share of Residue.*

Testatrix bequeathed to a married woman by name, describing her as married, a reversionary share of a fund of mixed real and personal estate, expectant on a life interest. The will declared that every gift thereby made to a married woman should be for her separate use, without power of anticipation, and that her receipts alone should be good discharges for the same. The tenant for life died in the lifetime of the testatrix, who nevertheless did not alter her will.

The married woman's share of the residue being now represented by a sum of cash standing in Court, uninvested, upon petition by the married woman to have the cash paid out to her, upon her separate receipt:—

Held, that she was so entitled.

In re Ellis' Trusts (1) observed upon.

Statement.

PETITION.

Sarah Crooke Croughton, widow, by her will, dated the 15th of June, 1871, devised all her real estate to the use of trustees upon trust for sale, and bequeathed all her personalty to the same trustees upon trust to convert such parts thereof as should not consist of money, and declared that the trustees should, out of the moneys so to arise and the ready money of which she should be possessed at her death, pay her funeral and testamentary expenses, debts, and legacies, and should stand possessed of "the residue of the said trust moneys," upon trust to invest the same in specified securities, and pay the income to testatrix's sister, *Elizabeth Mary Jane Jones*, for life; and after her death, upon trust "to divide and pay the said residue of the said trust moneys between and unto the children of my said sister, namely, my nephew *William Chadwick Jones* and my niece *Mary Jane*, the wife of *Robert Halson*, equally, share and share alike, as tenants in common, if they shall be living at the death of my said sister." Testatrix then made certain provisions in the event, which did not happen, of the death of either of her said nephew and niece during the lifetime of her sister; and the will contained the following proviso:—

(1) Law Rep. 17 Eq. 409.

“And I hereby further declare my will to be, that every gift, devise, bequest, or provision hereby given, devised, bequeathed or made to or for any woman under or by virtue of this my will, is so given, devised, bequeathed, or made to her for her sole and separate use independently and exclusively of any husband with whom she may at any time be married, and free from his debts, control, interference or engagements, and so that she shall not have power to deprive herself of the benefit thereof by sale, mortgage, charge or otherwise in the way of anticipation, and that her receipt alone, notwithstanding her coverture, shall be a sufficient discharge for the same.”

Testatrix's sister, *Elizabeth M. J. Jones*, died on the 13th of September, 1872.

On the 16th of June, 1874, the testatrix died, without having altered or revoked her will, and leaving her nephew *Chadwick Jones*, and her niece *Mary Jane*, the wife of *Robert Halson*, surviving.

The clear residue of the testatrix's estate had been ascertained, and one moiety thereof was now represented by a sum of £2888 3s. cash, standing in Court, uninvested.

The petition was presented by *Mary Jane Halson*, by her next friend, praying that the sum of £2888 3s. cash, so standing in Court as above mentioned, or the residue thereof after payment of costs, might be paid to a person therein named “as her attorney, and for her sole use”; or, in the alternative, that the same residue might be invested and the income of the investment paid to the Petitioner for life, or until further order.

The petition stated that the Petitioner was living apart from her husband, but this fact was not relied upon as affording any ground for the prayer of the petition.

It further stated that the Petitioner's husband would, if necessary, give up any claim to the sum in Court.

Service on the husband of the petition and of the order to attend was proved; and it was in evidence that the husband had signed a declaration dated the 19th of March, 1878, whereby he consented that an order should be made in the terms of the first alternative of the prayer, and instructed Petitioner's solicitor to consent on his behalf to such an order being made.

V.-C. B.

1878

In re

CROUGHTON'S
TRUSTS.

Statement.

V.-C. B. *Cracknall*, for the Petitioner:—

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CROUGHTON'S
TRUSTS.

Argument.

The only question is whether the clause in the will restraining anticipation by the wife has any application to the gift to her of a share of mixed residue, which is equivalent to a gift of so much cash. The share does, in fact, at this moment, consist of cash.

The distinction, in this respect, between a gift of consols, as being of a fund producing income, and a gift of something which does not produce income, was recognised by the Master of the Rolls in *In re Ellis' Trusts* (1), who expressly left this particular case open for future decision; and it is believed the point has never been decided.

It was glanced at in *In re Sykes' Trusts* (2), and in *Cooper v. Macdonald* (3), but not settled. The former authority and others were brought before the notice of the Master of the Rolls in *In re Ellis' Trusts*.

Here, it will be observed, there is no direction to invest which could apply to this fund—no distinction between income and capital—no mention of income whatever. It is submitted that the fetter of restraint upon anticipation—itself an anomaly and an exception to the power of disposition over property which the law generally permits to every owner—cannot apply to what this is, namely, the bequest of a sum of money.

Robert K. Rodwell, for the Respondents, the trustees of the will:—

In *Re Sarel* (4) it seems to have been decided by Lord *Hatherley*, when Vice-Chancellor, that the restraint upon anticipation would attach to a sum of money bequeathed to the separate use of a married woman. The case was mentioned in *In re Ellis' Trusts*, but the Master of the Rolls made no observation upon it. The rule as to real estate is well established, namely, that a devise in such terms as these would give the married woman an estate for life, with power of appointment by will. The Master of the Rolls said he saw no reason why that rule should not apply to income-producing funds. Accordingly, there seems no reason

(1) Law Rep. 17 Eq. 409.

(2) 2 J. & H. 415.

(3) 7 Ch. D. 288.

(4) 4 N. R. 321; 10 Jur. (N.S.) 876.

4 D. G. S. 395

why this sum of money should not be invested, and then the ordinary rule would apply as of course. V.-C. B.

Cracknall:—

In *Re Sarel* (1) there appears to have been a contest between the husband and the wife. Here, as a matter of fact, the husband consents, although, in our view, his consent is not necessary. We thought it necessary, however, to shew that he has had notice of the petition.

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*In re*  
 CROUGHTON'S  
 TRUSTS.  
 ~~~~~  
 Argument.
 ~~~~~

BACON, V.C.:—

Judgment.  
 ~~~~~

The case undoubtedly is not without difficulty.

The decision of the Master of the Rolls in *In re Ellis' Trusts* (2) seems to have gone upon the fact that the gift there was a gift of a sum of consols producing income. In the case before Vice-Chancellor Wood, the gift seems to have been one of a sum of money.

Now the gift here must be considered as equivalent to a gift of a sum of money. The testatrix has made one residuary fund of all her real and personal estate. She intended to provide for her sister, *Elizabeth Mary Jane Jones*, and accordingly she directs her trustees to invest the residue, and pay the income of the investments to *Elizabeth Jones* for life. But she gives no other direction to invest. Upon the death of *Elizabeth Jones*, the trust is, "to divide and pay the said residue between and unto the children of my said sister, namely, my nephew *William Chadwick Jones*, and my niece *Mary Jane*, the wife of *Robert Halson*, equally, share and share alike, as tenants in common." How can that trust be properly executed except by realizing the residue, and handing over the corpus to *Mary Jane Halson* and her brother? In this case the gift is a gift of a sum of money.

The Master of the Rolls says (3) he is not at all certain that the distinction between alienation and anticipation was brought before the mind of the Vice-Chancellor in *In re Sykes' Trusts* (4). I confess I do not quite follow that—I do not see the difference between anticipation and alienation. In this instance the testatrix

(1) 4 N. R. 321; 10 Jur. (N.S.) 876.

(2) Law Rep. 17 Eq. 409.

(3) Law Rep. 17 Eq. 411.

(4) 2 J. & H. 415.

4 D. 87-5-395.

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 1878
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 CROUGHTON'S
 TRUSTS.
 —
 Judgment.
 —

goes on to direct:—[His Lordship proceeded to read the above clause as to the gifts to married women being to their separate use, without anticipation, and that their receipts should be sufficient discharges; and continued:—] A sufficient discharge for what? For the payment of this sum of money, which is what this share of residue really comes to.

As to the statement in the petition that the husband and wife are living apart, I can pay no attention to that. For anything that appears, they may have separated amicably, in order that this fund may be handed over to the wife, and the husband get the benefit of it.

But such an order as is now asked for ought not to be made without the knowledge of the husband. Whether he consents or not, it is quite right that he should be served, as in this instance he has been served, with notice of the petition.

I think the Petitioner is entitled to this sum of cash. No declaration is necessary: there will simply be an order consistent with the terms of the first alternative of the prayer of the petition.

Solicitors: *Alfred Peachey; Ford, Lloyd, & Bartlett*, agents for *York, Newmarket*.

V.-C. B.
 1878
 May 18.

In re PATENT STEAM ENGINE COMPANY.

Company—Winding-up Petition—Who may present—Contributory—Companies Act, 1862, s. 82; Companies Act, 1867, s. 40.

A petition for winding up a company may be presented by persons who have obtained a decree of the Court ordering the company to allot them shares and to register them as shareholders, although their names are not on the register at the time of the presentation of the petition.

Statement.
 —

PETITION.

By an order of the Court dated the 11th of February, 1875, in a cause of *Turner v. Moy*, the Respondents, the *Patent Steam Engine Company, Limited*, who were Defendants in the suit, were ordered, amongst other things, forthwith to allot to the Petitioners, who were Plaintiffs in the suit, 377 preference shares in the company, in certain specified proportions, and to register them as

holders of the said respective shares, and to issue to them proper certificates for the same.

This petition stated, amongst other things, the above order, also an order made in the suit on the 18th of January, 1878, whereby it was ordered that the register of members should be rectified by inserting the names of the Plaintiffs, the present Petitioners, on the register as holders of the 377 shares, and that the company should pay to the Plaintiffs the costs of the application.

It further stated that the company had not paid to the Petitioners the costs so directed to be paid; that the assets of the company were being distributed under a voluntary winding-up, under resolutions informally passed on the 21st of July, 1875, and purporting to have been confirmed on the 5th of August following, and that no payment had been made to the Petitioners on account of the shares which ought immediately after the decree of the 11th of February, 1875, to have been allotted to them.

The petition alleged that the company had not, since the passing of the so-called resolutions, carried or pretended to carry on any business; charged that the dealings of the directors required investigation; and prayed for the common winding-up order.

Hemming, Q.C., and *Grosvenor Woods*, for the Petitioners.

Sir *H. Jackson*, Q.C., and *William Douglas Edwards*, for the company:—

The Court has no jurisdiction to make a winding-up order on the petition of persons who are not in fact registered shareholders, though they may be entitled to become shareholders and to be registered: *Companies Act*, 1867 (30 & 31 Vict. c. 131), s. 40. The shares in respect of which the Petitioners claim to be entitled to pray for this order were not originally allotted to them, nor have the shares been held by them and registered in their names for six months, as required by the Act.

The rest is discretionary, and the Court always pays attention to the wishes of a large majority of shareholders, if it sees that the minority will get all they are entitled to under a voluntary liquidation: *In re London Suburban Bank* (1).

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V.-C. B. BACON, V.C. :—

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In my opinion the technical objection has no weight. The Petitioners have been declared by the Court entitled to be shareholders, and the company have been ordered to allot them these shares, and to register them as shareholders in respect of them. These orders the company have failed to comply with, and it is only through their default that the Petitioners' names were not on the register upwards of six months ago.

As to the rest, enough has been stated to shew that the Petitioners are entitled to the relief they seek, and there must be the usual compulsory order.

Solicitors: *Snell & Greenip ; Ashurst, Morris, & Co.*

RISHTON *v.* WHATMORE.

[1877 R. 133.]

V.-C. H.

1878

March 1.

Vendor and Purchaser—Specific Performance—Sale by Auction—Conditions of Sale, Omission of Reference to, in Auctioneer's Book—Statute of Frauds.

At a sale by auction subject to conditions, the auctioneer entered in his sale book the names of the vendor and purchaser, the subject-matter of the sale, and the amount of the purchase-money, but omitted, in the entry, to embody or make any reference to the conditions of sale. There was no other memorandum or contract in writing:—

Held, that there was no sufficient contract in writing within the *Statute of Frauds*, and specific performance refused as against the purchaser.

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THIS was an action by a vendor for the specific performance of a contract for sale. The property, which consisted of the *Castle Inn* at *Kidderminster*, was put up for sale by auction, subject to particulars and conditions of sale. At the sale the Defendant Mrs. *Whatmore* was the highest bidder, and she was declared by the auctioneer to be the purchaser; but when he asked her after the conclusion of the biddings to sign the memorandum at the foot of the conditions of sale, she declined to do so, saying that she had not with her the money to pay the deposit, but would bring it the next day. She subsequently, however, declined to sign any memorandum or agreement, and refused to complete the purchase. This action was then brought, and the defence was that there was no sufficient contract or memorandum signed by the purchaser within the *Statute of Frauds*. The Plaintiff relied upon the entry which the auctioneer had made in his sale book at the time of the sale. This entry was headed "*Castle Inn, Park Lane, belonging to Robert Rishton,*" and it gave the name of Mrs. *Whatmore* as the highest bidder, and the sum bid by her, viz. £960, but it contained no reference whatever to the particulars or conditions subject to which the sale was made.

Statement.

Dickinson, Q.C., and G. Harris Lea, for the Plaintiff:—

Argument.

The vendor by appointing the auctioneer to sell, and the bidder by the act of bidding, respectively constitute the auctioneer their agent; the writing of the bidder's name by the auctioneer in his book is a signature sufficient to bind the bidder within the *Statute*

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of *Frauds*, and specific performance of a contract so constituted has been enforced: *White v. Proctor* (1); *Kemeys v. Proctor* (2). Here the entry in the auctioneer's book comprised the names of the vendor and the purchaser, the subject-matter of the contract, and the price to be paid, and nothing more is requisite: *Williams v. Lake* (3); *Blagden v. Bradbear* (4).

Hastings, Q.C., and *Cottrell*, for the Defendant:—

The sale was made subject to particulars and conditions which are neither embodied in, annexed to, or in any manner referred to in or connected with the entries in the auctioneer's book. If the entries in the book constituted any contract at all, it was an open contract, and therefore one different from the only contract which could have been constituted at this sale. There was accordingly no memorandum or contract in writing sufficient to satisfy the *Statute of Frauds* and to entitle the Plaintiff to specific performance: *Peirce v Corf* (5); *Hinde v Whitehouse* (6).

Dickinson, in reply.

Judgment.

HALL, V.C.:—

The fallacy of the Plaintiff's case, is that he seeks to enforce a contract contained in an entry in an auctioneer's book, which entry leaves out the conditions of sale, which are an essential part of the contract. It is plain upon the authorities, such as the cases of *Kenworthy v. Schofield* (7) and *Peirce v. Corf*, that it is impossible to use an entry in an auctioneer's book for the purpose of proving a contract for sale within the *Statute of Frauds*, unless such entry comprises such a reference to the conditions of sale subject to which the property was sold, as to identify them, upon production, as being the conditions mentioned in the entry.

The action must be dismissed with costs.

Solicitors: *J. A. Talbot*, for *W. H. Talbot, Kidderminster*; *F. T. Girdwood*, for *W. A. Crowther, Kidderminster*.

(1) 4 Taunt. 209.

(4) 12 Ves. 470.

(2) 1 Jac. & W. 350; 3 V. & B.

(5) Law Rep. 9 Q. B. 210.

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(6) 7 East, 558; Dart, V. & P. 5th

(3) 2 E. & E. 349.

Ed. p. 221.

(7) 2 B. & C. 945.

✓ DAVIES v. LONDON AND PROVINCIAL MARINE
INSURANCE COMPANY.

[1877 D. 164.]

FRY, J.

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Feb. 28;
March 1, 2.

*Surety—Contract—Concealment—Disclosure—Change of Circumstances—Illegal
Contract—Interference of Court.*

Where parties are contracting, either of them, unless he is under a duty to the other, may keep silence even as to facts which he believes would be operative on the mind of the other; if however one of them has made a statement which he believes to be true, but which in the course of the negotiation he discovers to be false, he is bound to correct his erroneous statement.

In some cases, such as contracts between solicitor and client, there is a duty to make entire disclosure. In others, such as contracts of partnership, everything material must be disclosed. There is no such duty in the case of a contract of suretyship, but nevertheless very little said which ought not to have been said, and very little omitted which ought to have been said, will suffice to avoid the contract.

The officers of a company, believing that the retention of money by one of their agents amounted to felony, directed his arrest. Certain friends of his came to the officers of the company and proposed to deposit a sum of money by way of security for any deficiency. On the same day the company was advised that the acts of the agent did not amount to felony, and the directions for the arrest were withdrawn. Later in that day the friends of the agent had a second interview with the officers of the company, and agreed to deposit a sum of money as security for his defaults, no mention being made of the withdrawal of the directions for the arrest. The sum of money was afterwards deposited with trustees on an agreement for the security of the company:—

Held, that the change of circumstances ought to have been stated to the intending sureties, and that the agreement must be rescinded and the money returned to the sureties:

Held, that even if the agreement was illegal as compounding a felony, the Court would interfere in a case where the money was actually in the hands of trustees, and pressure had been exercised.

ON the 30th of June, 1874, one *J. T. Evans*, who had previously been manager at *Liverpool* of a branch office of the *London and Provincial Marine Insurance Company*, and had had power to issue policies, became their agent at a salary; he was thereafter to submit all proposals for insurances to the office of the company in *London*, where the proposals were to be approved of or refused, and whence the policies were to be issued. In April, 1876, the

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company discovered that *Evans* had issued a policy in the name of the company without their authority and without accounting to the company for the premiums. Major *Daniell*, the secretary of the company, thereupon went to *Liverpool*, and finding that there were other similar cases, after consulting with Mr. *Burn* the solicitor of the company, gave orders to detectives to arrest *Evans* if he was found. On the 14th of April Mr. *Gee* and Mr. *Humphreys*, friends of *Evans's*, called upon Major *Daniell* and pressed for an arrangement, which he refused to entertain, stating that he could not release the orders for the arrest, and referring them to Mr. *Burn*. On the 15th of April Mr. *Gee* and Mr. *Humphreys* called on Mr. *Burn*, who, amongst other things, said that he would not be a party to compounding a felony, but that there were two ways of looking at things, the civil and the criminal. Later in that day Mr. *Burn* had a conference with counsel in *London*, who gave his opinion that *Evans* could not be charged either with embezzlement or as a fraudulent bailee. Upon this the instructions for the arrest of *Evans* were withdrawn. Still later on that day Mr. *Gee* had a second interview with Mr. *Burn*, who said that if *Evans* was prepared to deposit a sum of money, Mr. *Burn* would advise the company to take it as a security and to go into accounts with *Evans*, but nothing was said as to any agreement not to prosecute *Evans*, nor did Mr. *Burn* say that in his opinion any criminal offence had been committed, though he spoke of embezzlement; and on Mr. *Gee* saying, "You will take care not to arrest *Evans* before Tuesday," Mr. *Burn* said, "Certainly not." On the 18th of April, 1877, Mr. *Gee*, Mr. *Humphreys*, and the Plaintiff, *J. E. Davies*, another friend of *Evans's*, came to Mr. *Burn's* office, and arranged that £2000 should be deposited in a bank in the names of Major *Daniell*, Mr. *Borrodaile*, and Mr. *Davies*. The money was accordingly deposited, and an agreement expressed to be made between the company and *Evans* was drawn up and signed by *Davies*. The terms were that *Evans* should forthwith account to the company for all moneys due by him to the company, and indemnify the company in respect of certain policies of insurance and premiums received by him without having submitted the proposals to the company; that the sum of £2000 should be deposited in the names of *J. Borrodaile, J. L.*

Daniell, and *J. E. Davies*, who should hold it as collateral security, in trust (a) to pay certain expences, (b) to pay certain re-insurances, (c) to indemnify the company, (d) to secure to the company the payment of all premiums received by *Evans* and not hitherto paid as therein mentioned, (e) subject to compliance with the above terms and to all the aforesaid payments being made, the £2000, or the balance thereof, to be paid to Mr. *Davies*; this arrangement not to prejudice or delay the company in any proceedings they might think proper to take for an account and recovery of moneys due or to become due from *Evans* to the company as agent for the company.

A large sum of money remained due from *Evans* to the company, and the company brought an action in this Court against *Davies* and *Borrodaile* claiming to have the £2000 paid to them. The action came on for trial before Mr. Justice *Fry* in July, 1877, the principal defence set up by *Davies* being that the agreement of the 18th of April was illegal, as intended to compound a felony, and could not be enforced. In the course of the examination of the witnesses it came for the first time to the knowledge of *Davies* and his friends that before the agreement was made and the money deposited, the company had been advised that *Evans* could not be prosecuted for felony, and had withdrawn the instructions for his arrest. It further appeared that part of the £2000 was obtained by or through other friends, and that part was obtained or met by *Evans* himself. At the end of that trial Mr. Justice *Fry* expressed an opinion in favour of the company; but his Lordship directed the action to stand over, giving *Davies* leave to bring an action to have the agreement of the 18th of April cancelled.

Davies accordingly brought an action against the company, *Borrodaile*, and *Daniell*, alleging that Mr. *Burn*, on behalf of the company, had concealed the facts, and had deliberately allowed *Evans's* friends to continue in the belief that if the £2000 was not deposited the company were in a position to arrest and criminally prosecute him; and that *Davies* was induced to act as he did by such pressure and for such consideration alone. And the Plaintiff claimed to have the agreement cancelled and the £2000 paid to him.

The two actions now came on together. Witnesses were ex-

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FRY, J. amined on both sides, and the effect of the evidence is stated above,
1878 and in the judgment below.

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Aspinall, Q.C., *North*, Q.C., and *Romer*, for the Plaintiff:—

The company knowingly left *Davies* under the impression that criminal proceedings would be taken against *Evans*, and thus induced *Davies* to deposit this money, which he is therefore entitled to have returned, and the agreement must be rescinded: *Hill v. Gray* (1). That case was not objected to by Lord *Chelmsford* in *Peck v. Gurney* (2); *Keates v. Earl Cadogan* (3). *Hill v. Gray* was not referred to in the judgments in *Smith v. Hughes* (4). *Turner v. Harvey* (5) shews the effect of anything which misleads. *Pulsford v. Richards* (6), *Lee v. Jones* (7), and *Smith v. Harrison* (8), shew what is the law.

There was a threat of criminal proceedings used in order to extort money, and such a contract cannot stand: *Traill v. Baring* (9); *Williams v. Bayley* (10); *Reynell v. Sprye* (11). Nor can an agreement to compound a felony be valid: *Osbaldeston v. Simpson* (12).

Higgins, Q.C., *Poland*, and *W. W. Karlake*, for the Defendants:—

In *Williams v. Bayley* there was a pressure on the persons who gave the security, but there was none here. The principles as to principal and agent do not apply to the case of suretyship, which is more like the case of vendor and purchaser, and is of the *caveat emptor* class: *Leake on Contracts* (13); *Hamilton v. Watson* (14). The doctrine laid down in *Carter v. Boehm* (15) has been questioned, and certainly does not apply to guarantees: *Greenfield v. Edwards* (16); *Pledge v. Buss* (17); *Wythes v. Labouchere* (18). The utmost is that Mr. *Burn* did not say that

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| (1) 1 Stark. 434. | (10) Law Rep. 1 H. L. 200. |
| (2) Law Rep. 6 H. L. 377, 391. | (11) 1 D. M. & G. 660. |
| (3) 10 C. B. 591. | (12) 13 Sim. 513. |
| (4) Law Rep. 6 Q. B. 597. | (13) Page 203. |
| (5) Jac. 169. | (14) 12 Cl. & F. 109. |
| (6) 17 Beav. 87. 17 Jan 866 | (15) 3 Burr. 1905, 1909. |
| (7) 17 C. B. (N.S.) 482. 11 Jan 4581 | (16) 2 D. J. & S. 582. |
| (8) 26 L. J. (Ch.) 412. 3 Jan 4527 | (17) Joh. 662. |
| (9) 4 D. J. & S. 318. 18 Jan 4557 | (18) 3 De G. & J. 593. 5 Jan 45. |
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it was doubtful whether *Evans*' conduct was actually criminal; and is silence in such a case so fraudulent as to deprive us of the benefit of a contract actually completed? Mr. *Burn* was under no duty to *Evans* or his friends, and they were at arm's length. *Turner v. Harvey* (1) and *Smith v. Harrison* (2) were clear cases, but unlike this. This is not an executory contract, but the Court is asked to set aside a completed transaction: *Story* on Contracts (3). There is an actual trust as to this £2000, and the Court must decide what is to be done with it, whether the transaction was legal or not: *Sheppard v. Owenford* (4). Some of the money was found by *Evans*, and what right can this Plaintiff have to money which belongs to a man who was indebted to the company? It is clear that the fund cannot be paid to this Plaintiff. On his own shewing, he was trying to compound a felony whilst the agents of the company were only anxious to get security for what was due to the company. *Thomson v. Thomson* (5), *Farmer v. Russell* (6), and *Williams v. Bayley* (7), shew what agreements are illegal. But in fact there was no felony, and the agents of the company were acting with perfect propriety. They made no misstatement and concealed nothing. At first they did think that *Evans* had been guilty of felony, and said so, and they then refused to compound it. They afterwards were advised there was none, and then they took the security which was offered.

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I have now before me two actions, one by the *London and Provincial Marine Insurance Company* against *Davies*, and another by *Davies* against the *London and Provincial Marine Insurance Company* and other Defendants. The question which I have to determine is with regard to a sum of £2000 paid into a joint account under the circumstances which I am about to mention. [His Lordship then stated the facts of the case, and that he found as a fact that during the interview in the morning of Saturday the 15th of April there had been a belief common to both contracting

(1) Jac. 169.

(2) 26 L. J. (Ch.) 412. *3 Jac. 21287*

(3) Page 619, § 649.

(4) 1 K. & J. 491.

(5) 7 Ves. 470.

(6) 1 B. & P. 296.

(7) Law Rep. 1 H. L. 200.

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parties that there was at least a probable cause for the prosecution of *Evans*, and that it was the intention of the company to prosecute; that there had been a reliance upon a third fact, namely, the fact that the police had instructions to arrest *Evans* upon that charge; and that all those three things were known by Mr. *Burn* on behalf of the company to be operating upon the minds of the persons with whom he was negotiating. But in the time between the two interviews all those things had been changed, and the question was whether it was right to allow the pressure which had been exerted upon the minds of one of the negotiating parties to remain operative after the circumstances had entirely changed. Upon the whole evidence his Lordship had come to the conclusion that nothing was said or done at the second interview which could have induced or did induce Mr. *Gee* to believe that those circumstances were changed, and that Mr. *Burn* must have known at the close of that interview that that was the state of mind of Mr. *Gee*, and that therefore the pressure was still operative. His Lordship then continued :—]

The state of facts to which I have referred has given rise to an elaborate argument upon the duty of Mr. *Burn* to make disclosures under the circumstances which existed. The law upon that point seems to me to stand very much in this position. Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose, to shew that the duty existed. Now undoubtedly that duty does in many cases exist. In the first place, if there be a pre-existing relationship between the parties, such as that of agent and principal, solicitor and client, guardian and ward, trustee and *cestui que trust*, then, if the parties can contract at all, they can only contract after the most ample disclosure of everything by the agent, by the solicitor, by the guardian, or by the trustee. The pre-existing relationship involves the duty of entire disclosure. In the next place, there are certain contracts which have been called contracts *uberrimæ fidei* where, from their nature, the Court requires disclosure from one of the contracting parties. Of that description there are well-known instances to be found. One is a contract of

partnership, which requires that one of the partners should disclose to the other all material facts. So in the case of marine insurance, the person who proposes to insure a ship or goods must make an entire disclosure of everything material to the contract. Again, in ordinary contracts the duty may arise from circumstances which occur during the negotiation. Thus, for instance, if one of the negotiating parties has made a statement which is false in fact, but which he believes to be true and which is material to the contract, and during the course of the negotiation he discovers the falsity of that statement, he is under an obligation to correct his erroneous statement; although if he had said nothing he very likely might have been entitled to hold his tongue throughout. So, again, if a statement has been made which is true at the time, but which during the course of the negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances.

It has been argued here that the contract between the surety (for in fact *Davies* was a surety for *Evans*) and the creditor, is one of those contracts which I have spoken of as being *uberrimæ fidei*, and it has been said that such a contract can only be upheld in the case of there being the fullest disclosure by the intending creditor. I do not think that that proposition is sound in law. I think that, on the contrary, that contract is one in which there is no universal obligation to make disclosure, and therefore I shall not determine this case on that view. But I do think that the contract of suretyship is, as expressed by Lord *Westbury* in *Williams v. Bayley* (1), one which "should be based upon the free and voluntary agency of the individual who enters into it." I think that principle especially applicable here, because there is no consideration in this case, as in many cases of suretyship, for the contract so entered into; and therefore I think, to use the language of Lord *Eldon* in *Turner v. Harvey* (2), it is a contract in respect of which a very little is sufficient. Very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid. It is one, furthermore, in which I think that everything like pressure used by the intending creditor will have a very serious effect on the

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(1) Law Rep. 1 H. L. 200, 219.

(2) Jac. 169, 178.

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validity of the contract; and the case is stronger where that pressure is the result of maintaining a false conclusion in the mind of the person pressed.

Now, to apply those observations to this case, it will have been seen, from what I have already said, that I think the payment of money into the bank on the 18th of April was produced by what had been said by Major *Daniell* and by Mr. *Burn* at the first interview on the 15th of April; that it was produced by the belief that the company had a probable cause for prosecution; by the belief that, as a matter of fact, they did intend to prosecute; by the belief that the police were instructed to arrest *Evans*; and those things having been stated at the earlier interview of the 15th, it was, in my opinion, the duty of Mr. *Burn* to state at the second interview that those facts no longer existed. I think that the language in which he assented to and upheld the erroneous impression of Mr. *Gee* by speaking of *Evans* as a person who had embezzled, and by saying that the police should not arrest *Evans* until Tuesday, were sufficient circumstances in themselves to render it impossible that the payment of money produced by that pressure and by those representations should be valid. I think there was that little which is quite enough to prevent the contract from being upheld.

It is said, in answer to this line of argument, that the representations in this case did not induce the contract, and that if there was *dolus malus*, it was not *dolus malus* of which you could predicate that it was *dans locum contractui*. Now, I do not think that that view is tenable. It is said, no doubt, that *Evans* was supposed to be a rich man, and that *Evans* was not believed by his friends to have committed this offence. That may have been their state of mind when they began the negotiations. It certainly was not their state of mind on the 14th, still less was it their state of mind at their first interview on the 15th, and I think their state of mind was well known and appreciated by Mr. *Burn*.

It is further to be considered whether this agreement is not void upon another ground, namely, that these proceedings were an attempt to stifle a prosecution. Now, I think that it was so understood by Mr. *Gee* and Mr. *Humphreys*, and that Mr. *Burn* understood that they so understood it, and that he believed that

they considered themselves to be contracting for that purpose. I am very much inclined to think that would be enough to render the contract obnoxious to the well-known rule of law which makes a contract for the stifling of a prosecution void on grounds of public policy. But whether that be so or not, I think the contract is in this dilemma—either it was a contract to stifle a prosecution and is bad on that ground, or it was a contract produced by the belief that a prosecution was to be stifled when no prosecution was contemplated, and therefore the contract was produced by a misrepresentation, and on that ground also cannot stand.

A further argument adduced on behalf of the company is this. It is said that, assuming the contract to be illegal, *Davies* was equally a party to that illegal contract, and that therefore the Court will stay its hand, and then the maxim *melior est positio defendantis* will prevail. But, in the first place, there is great difficulty in applying that principle to a case where money has been placed *in medio*, and where the Court must do something with it, or else leave it to be locked up for ever.

In the next place, it appears to me to be clear that illegality resulting from pressure and illegality resulting from an attempt to stifle a prosecution do not fall within that class of illegalities which induces the Court to stay its hand, but are of a class in which the Court has actively given its assistance in favour of the oppressed party, by directing the money to be repaid. The case of *Williams v. Bayley* (1) appears to me a sufficient authority for that proposition, and therefore I do not think that that objection can prevail.

It appears, however, that a portion of the £2000 found by *Davies* was ultimately met by certain bills of *Evans*, or was found by *Evans*, and it has been suggested, perhaps as much by myself as by counsel for the company, that that created a difficulty in the way of the Plaintiff. I do not think that that objection can be maintained. I think that if the agreement was void on the grounds I have referred to, independently of any question with regard to contribution, the mere fact of there being a subsidiary arrangement under which *Evans* was to indemnify *Davies* to a certain extent, cannot make the transaction valid. If the company had

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(1) Law Rep. 1 H. L. 200.

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dealt with *Evans* direct it might have been one thing, but as the company were pressing *Evans'* friends and coming to an agreement with them, which I hold to be illegal, the mere fact that *Evans'* friends had dealt with him will not, in my opinion, validate the agreement. Furthermore, the fact that *Davies* had, subsequently to signing the agreement and depositing the money, obtained security from *Evans* for a part of the amount, will not, I think, stand in his way, because it is evident from the facts before me that at the time when he did so he was not in full possession of the grounds upon which he has now come to seek relief—in fact, he never was fully informed of the grounds upon which he now maintains his case until the trial of the first action. It appears to me, for the reasons I have stated, that the contract cannot be upheld, and that it must be rescinded.

I have one other observation to make, which is, that, although I have been obliged to hold that this contract is affected with illegality and cannot be maintained, it does not appear to me a case in which there is any slur upon the personal conduct of any of the persons concerned. Major *Daniell* and Mr. *Burn* were acting under circumstances of great difficulty. They had to protect not merely the interests of the company with regard to the prosecution of their agent, but also the financial interests of the company; and if they went wrong, as I think they did, they went wrong under circumstances which rendered their conduct very excusable.

Declare that the agreement of the 18th April, 1877, ought to be rescinded. Let the £2000, and any accumulations thereon, be paid to *Davies* and the friends of *Evans* who advanced the money, they being joined with *Davies* as Plaintiffs by amendment. Dismiss the first action with costs, except the costs of the hearing, which are to be paid by *Davies*: the Defendants in the second action to pay the costs of that action.

Solicitor for Plaintiff: *J. H. Lydall*, agent for *T. & T. Martin*, *Liverpool*.

Solicitors for Defendants: *Crosley & Burn*.

BULLEY v. BULLEY.

[1872 B. 223.]

Solicitor—Charging Order—23 & 24 Vict. c. 127, s. 28.

B. was in possession of real estate as trustee of a will under the trusts of which he was beneficially entitled to a share and the Plaintiff to another share. By deed of August, 1867, the Plaintiff conveyed her interest to *B.*, who made a mortgage of the property to *C.* After this the Plaintiff, having discovered early deeds under which she claimed to be tenant in tail of the whole estate by a title paramount to the will, filed a bill against *B.* and *C.* praying that the deed of August, 1867, might be set aside, that she might be declared entitled as tenant in tail, and that the mortgage, so far as it affected her interest, might be declared void. This bill was dismissed, and the dismissal was affirmed on appeal:—

Held, by *Bacon*, V.C., and by the Court of Appeal, that the whole property was preserved for the persons entitled under the will by the defence conducted by *B.*'s solicitor; and that the solicitor was entitled to a charging order for his costs upon the whole estate, and not merely upon *B.*'s beneficial interest in it.

THIS was a petition by the solicitors of the Defendants for a charging order on the whole estate for their costs of the suit, which related to about fifteen acres of freehold land forming part of a farm called *Ashman's Farm*, the rest of which was copyhold.

John Bulley the elder, who had been admitted to the copyholds in 1781, surrendered them in 1832 to the use of his will, and in 1840 he made a will by which he devised the freeholds to *White* and *Henry Bulley* upon trust to sell and divide the proceeds among four persons therein named, and directed them to sell the copyholds and hold the proceeds on like trusts. He died in 1840. *White* disclaimed, and *Henry Bulley* acquired from the four legatees their beneficial interests in the property. *Henry Bulley* died in 1849 without issue and intestate, leaving his father, *Richard Bulley*, his heir-at-law. *Richard Bulley* died in 1851, leaving a will dated the 20th of March, 1851, by which he devised the farm to his son *William Bulley*, his heirs and assigns, upon trust, out of the rents and profits, to pay an annuity of £40 to the testator's wife, *Elizabeth Bulley*, and to divide the residue of the rents equally between the said *William Bulley*, the De-

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defendant *John Bulley, Ruth Naomi Potter, Jane Bulley*, and the Plaintiff *Emily Elizabeth Bulley*, and after the decease of the testator's wife to sell the farm and stand possessed of the proceeds for the last-mentioned five persons in equal shares. *William Bulley* accepted the trusts of the will and divided the rents accordingly till his death in September, 1854. He left a will by which he devised all estates vested in him as a trustee of *Richard Bulley's* will to the Defendant *John Bulley* upon the trusts of that will, and gave all his own property to *John Bulley* upon trust to sell and convert the same, and after payment of certain legacies, upon trust to divide the proceeds equally between the Defendant *John Bulley, Ruth Naomi Potter, Jane Bulley*, and *Emily Elizabeth Bulley*. The copyholds were enfranchised to the Defendant *John Bulley* as trustee in 1866. By indenture of the 19th of August, 1867, the Plaintiff, in consideration of £250 paid to her by the Defendant *John Bulley*, conveyed to the Defendant *John Bulley* "All that the one-fifth part and all other the estates, shares, parts, and interests of her the said *Emily Elizabeth Bulley* of and in all that and those farm, lands, and premises called *Ashman's, &c., &c.*, and also all the one-fifth part or share, and all other the estates, shares, and interests of her the said *E. E. Bulley* of and in all moneys which may arise from any sale or disposal of the said farms, lands, messuages, outbuildings, barns, and premises called *Ashman's*." The Defendant *John Bulley* afterwards executed a mortgage of his interest in the property to the *South Essex Equitable Investment and Advance Company*.

The above was understood to be the state of the title, until in the year 1871, a deed of 22nd of October, 1841, was discovered shewing the facts which gave rise to the Plaintiff's claim.

The Plaintiff's case was in substance as follows: That the farm in question had passed by the will of *John Raven*, who died in 1760, having devised it to his daughter *Mary*, the wife of *Richard Bulley* the father, as tenant in tail; that her son, the above-named *John Bulley* the elder, had succeeded to the farm after her death as issue in tail; that *John Bulley* the elder had died without issue and without having barred the estate tail, whereupon the estate devolved on *Richard Bulley* the son, the younger brother of *John Bulley* the elder, and that by a deed dated the 22nd of

October, 1841, *Richard Bulley* the son, for the purpose of barring the estate tail in the freehold parts of *Ashman's Farm*, conveyed them to *Henry Bulley* and his heirs, upon trust to sell and to apply the proceeds according to the trusts of the will of *John Bulley* the elder; that this deed was never inrolled; that the estate tail accordingly had not been barred; and that the Plaintiff, who was now the issue in tail of *Mary Bulley*, was therefore, at the time of the execution of the mortgage of the 19th of August, 1867, entitled in tail to the whole of the fifteen acres in question.

The bill, which was filed against the Defendant *John Bulley* and the *South Essex Company* only, prayed, amongst other things, that the deed of the 19th of August, 1867, might be declared null and void, and be set aside, and for a declaration that the Plaintiff was entitled as tenant in tail, and that the mortgage of the 23rd of December, 1869, might, so far as the same affected the Plaintiff's interest, be declared void.

This bill was, on the 4th of March, 1874, dismissed as against both Defendants; and an appeal was, on the 26th of May, 1874, dismissed with costs (1).

The present petition was presented under the *Solicitors Act*, 23 & 24 Vict. c. 127, by *George Wyatt Digby* and *George Edward Digby*, solicitors, stating as above, and that they were duly retained and instructed by the Defendants to appear for and represent them; and that the result was that the Plaintiff's claim was successfully resisted, and the title of the Defendants to the property maintained and preserved.

The petition further stated as follows:—Not only the Defendant *John Bulley*, but also *Jane Bulley*, *Ruth Naomi Potter*, and *Thomas Potter*, upon first hearing of the Plaintiff's claims, consulted the Petitioners, and instructed them to offer to the Plaintiff £300 to compromise the claims, which offer was made and refused. When the suit was first instituted *John Bulley* gave the Petitioners a written retainer, and *Jane Bulley* and *Thomas* and *Ruth Naomi Potter* were aware of this, and assented to it; and further, *Jane Bulley*, being in possession of some of the deeds, documents, and other instruments of title relating to the trust, which properly belonged to *John Bulley* the trustee, at his request handed the

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same to the Petitioners, for the purposes of the defence. *Jane Bulley* also made an affidavit on behalf of the Defendant, *John Bulley*.

On the 20th of May, 1874, *Ruth Naomi Potter* died, having by will bequeathed her share to *Thomas Potter*, and to her three sons, *Henry, Charles, and John Potter*.

The petition stated that the Plaintiff was insolvent, and that *Thomas Potter* was out of the jurisdiction.

The Petitioners, on the 22nd of August, 1876, and on the 21st of March, 1877, delivered bills of costs to the Defendant *John Bulley*, amounting to £429 13s. 9d., which he did not pay, he also being, as the petition alleged, insolvent. Application for payment had also been made to *Jane Bulley* and *Thomas Potter*, but they refused, on the ground that the Defendant *John Bulley* was alone liable.

Thomas Potter and *Jane Bulley* had commenced an action in the Chancery Division against *John Bulley* for partition and sale of the estate.

The Petitioners, who still retained the deeds, and whose bill of costs, subject to taxation, amounted to £785 6s. 5d., prayed for a charging order on the whole estate.

The petition was heard before Vice-Chancellor *Bacon* on the 2nd of February, 1878.

Argument.
—

Swanston, Q.C., and Everitt, for the Petitioners:—

We admit at once that the costs of the mortgagee can be a charge on *John Bulley's* share only. But for the costs of the Defendant *John Bulley*, who was trustee for the Respondents, the Petitioners claim to have a charge on the whole estate. The whole legal estate was in *John Bulley*, and the bill prayed for a declaration that the Plaintiff was entitled as tenant in tail, so that the issue was whether the persons claiming under the will were entitled or not: the result was that they were held to be entitled, and the Plaintiff's claim was defeated. The case is analogous to that of the next friend of an infant, as in *Pritchard v. Roberts* (1). Sect. 28 of the Act is not limited either in terms or meaning to property recovered for persons who have given a written retainer. The lien

(1) Law Rep. 17 Eq. 222.

extends to any and all "property recovered or preserved." In this instance the Respondents took advice from the Petitioners, and one of them supplied papers for the defence. Both joined the Defendant in employing the Petitioners to try and get the suit compromised. The solicitor only wants a retainer in order to appear on the record in a proper manner: *Catlow v. Catlow* (1); *Bailey v. Birchall* (2); *In re Keane* (3); *Baile v. Baile* (4). The question went to the title of everyone who was interested in the property. The *cestuis que trust* were not, and rightly were not, parties to the suit. Lord Chancellor Selborne, in *Pinkerton v. Easton* (5), observes that the Act "has received a liberal interpretation, and has been held to apply even to property not belonging to the client, by whom the solicitor has been employed." Even under the old law, solicitors were entitled to a lien on title-deeds of property recovered by way of salvage: *Turner v. Letts* (6).

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Sir H. Jackson, Q.C., and Romer, for the Respondents:—

The costs cannot be charged upon the estate generally. The point was decided in *In re Keane*, following *Berrie v. Howitt* (7). The charge extends only to the property of the client, not to that of other people. In this instance *John Bulley* could claim nothing until he had accounted to his *cestuis que trust*. The shares of the Respondents are not within the words of the statute. "Recovered" they were not; nor were they "preserved," according to the view of the Lords Justices on the appeal. The Lord Justice James says (8), "The owners of the other three-fifths" (since two-fourths) "are not before us, and we have to determine what would be the Plaintiff's rights as between herself and *John Bulley*." There was no question about the other shares. In the cases cited the property charged was either the property of an infant who was a party to the suit, or of an administrator who represented the whole estate. *In re Keane* shews that the solicitors of a trustee cannot have a charge on the property of the *cestuis que trust*, only upon what is found due to the Plaintiff. The sums sought to be

(1) 25 W. R. 866. *2 CRP 362*. (5) Law Rep. 16 Eq. 490, 492.

(2) 2 H. & M. 371. *11 Ch 557*.

(3) Law Rep. 12 Eq. 415.

(4) Ibid. 13 Eq. 497.

(6) 7 D. M. & G. 243. *12 Ch 5105*.

(7) Law Rep. 9 Eq. 1.

(8) Ibid. 9 Ch. 746.

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charged are the costs of a suit rendered necessary solely from the fact of *John Bulley* having mortgaged his share. But for the mortgage the Plaintiff might have brought a simple ejectment. At least the Petitioners are entitled as against our shares to a charge for no more than the costs of an ejectment action. But how is the Court to distinguish? How can the Court estimate the amount by which the costs have been increased in consequence of the presence of the mortgagee?

The VICE-CHANCELLOR asked for a reply only on this suggestion.

Swanston, in reply :—

No just distinction as to the costs can be made, and none should be attempted. The prayer for relief as to the mortgage was inserted only to support a claim otherwise hopeless. The defence was successful on the main ground, and this is not a case in which the Court will split hairs.

Judgment,
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BACON, V.C. :—

This case is one, no doubt, of nicety and great importance, because it is of great importance that the statute which has been so often referred to should be well understood and not carried beyond its true meaning, although the Courts have said occasionally that it must be liberally construed. I do not know any more liberal or more just way of construing it than by considering what the words of the statute are, and bearing in mind what the policy of the law is. The law of salvage is well enough known, depending upon plain principles, not the subject of any particular statute (except the Shipping Acts), nor depending upon any statutory enactment. A ship at sea about to founder is saved by some other vessel. Then there comes the question of the right of the salvors to be paid the money coming to them out of that ship and its contents. There is no inquiry as to who is the owner of the ship. Nobody ever heard of such a thing. They may settle among themselves their averages or anything else. The law is, if you save a sinking ship, you shall be paid what is just out of the value of that ship. That I take to be the principle of the *Solicitors Act* referred to, for the words are distinct and

clear, and carry into effect plainly that principle. The 28th section of the Act is this: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or Judge . . . to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved"—that is, the sinking ship—"and upon such declaration being made, such attorney or solicitor shall have a charge," and so on. The words of the statute appear to me to be beyond doubt, and the only question I have to ask myself is, what is the property that has been preserved. It is quite indifferent who was the owner of it; if the property has been preserved, the solicitor is entitled, according to the words of the statute, to a charge upon it for his costs.

Now in this case there is no difficulty in ascertaining what was the property preserved. The Plaintiff files a bill alleging that, as tenant in tail, she is entitled to a certain estate, which has been dealt with in the way mentioned in the bill, and that none of those dealings ought to stand between her and her right. The way it has been dealt with is this: a man pretending to be the owner of that estate disposed of it by his will and constituted a trustee upon trust to sell. It was right that all this should be mentioned in the bill for the purpose of stating the case. It appeared, further, that by a subsequent transaction the Plaintiff had been induced to part with her share in that property, or her supposed share, for £250, and then being unable to proceed at law by ejectment, as she would otherwise have been, according to the statement of her case, she files her bill asking that she may, in the Court of Chancery, prosecute an ejectment, and that that deed, which might be said to be a defect in her title, or an impediment to her title, shall be removed. That is why the second topic is introduced. Then, thirdly, it was said that this trust for sale was incumbered by some transaction with an insurance loan company, and the prayer of the bill was for judgment as in an ordinary action of ejectment—that is, to recover the particular fifteen acres, I think it was; and that is defended by the trustee, by the person who the Plaintiff says is the trustee, who is recognised as the trustee—that is defended by him, and defended successfully, and the property is preserved from the attack which

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was made upon it by the Plaintiff. Preserved for whom? Not interfering with any of the rights which may exist beyond the mere possession of the property, because Mr. *Bulley* was the tenant in possession. He was the proper person against whom to bring ejectment at law. The other persons interested might at law, and might in this Court, have desired to come in and defend. That the proceedings were taken with the knowledge of the *cestuis que trust* is not at all in dispute. The affidavits have not been read, but it has been agreed on both sides that they had knowledge—I do not care how much knowledge—quite enough to justify them in applying to the Court to be at liberty to come in and defend their own right, quite enough to insure the success of any such application. The proceeding goes on with their full knowledge; it is in effect an action of ejectment. As an action of ejectment it is tried in this Court, and it is tried in the Court of Appeal, and the decision is, upon purely legal grounds, that the entail upon which the Plaintiff relies does not exist, and she cannot properly assert any claim under it, and the result is, that the property is preserved. If she had succeeded, it would have been wrested from the present owners; it would have been wrested from the owners, notwithstanding Mr. *Bulley* was only the tenant in possession, since they had not come in and sought to defend for themselves.

The cases upon the subject are plain enough and reconcilable enough. The case of *In re Keane* (1) is a decision on the statute, which says that the thing preserved shall bear the costs of its preservation. The thing preserved was the annuity. There was no question of any other trust in the settlement. It did not preserve the settlement. It preserved the right to receive the annuity, and upon that thing so preserved the charge was made.

It has been argued by Sir *Henry Jackson*, and also by Mr. *Romer*, that if it is through the trustee that the solicitor claims, then the charge must be subject to all the equities between the trustee and all the *cestuis que trust*. In my opinion, that is not a satisfactory or well-founded argument. That would be constituting or making the solicitor a *quasi* trustee—it would be

(1) Law Rep. 12 Eq. 115.

fixing upon him the consequences of any malfeasance or any delinquency of the trustee. Unless the statute is to be repealed—the case being plain that costs were incurred in preserving the thing, the subject of the suit—what can it signify whether the trustee was a defaulting trustee in respect of pecuniary transactions between himself and his *cestui que trust*? If he were a bankrupt, and there was not a farthing in the pound to pay his creditors, could it be said, in the face of the statute, that the solicitor is to forego his costs because his client had, as between himself and his *cestui que trust*, neglected to discharge his duty? It is impossible to read the words of the statute, or to consider the subject of the statute to which it is applied, or to consider the subject itself, and come to any such conclusion. I think in this case the trustee would, supposing he had properly discharged his duty as trustee, have been clearly entitled to all the costs he had incurred against the other persons who were interested with him in the estate. I think that, even if it were proved—and there is no evidence of it—that he had not properly discharged his duty as between himself and them, that could not be taken into consideration. If it be true that in an ordinary case of a trustee who has conducted himself properly, the right would exist to resort to the thing preserved in order to defray the expense incurred in the preservation of it, then it is quite clear that the statute applies, irrespective of the conduct of the trustee, and the solicitor can exercise his right—whether it is the partial or the entire property is indifferent—the right which a salvor would have to be indemnified for his costs in saving the ship.

I think, therefore, subject to the exclusion of the mortgagees' costs, the petition is right, and the solicitor is entitled to a charge for his costs. The mortgagees will add their costs to their security.

Swanston:—In *Pilcher v. Arden* (1) the Court held that Mr. *Brook* (the solicitor in that case) was entitled to have his costs paid; and to enable him to enforce payment of them, they gave him a charging order, following the words of the *Solicitors Act* of 1860, “with liberty to apply to the Judge to enforce it by

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C. A. sale or otherwise." I ask for that in this order; it seems to be the settled form.

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The VICE-CHANCELLOR assented.

C. A. *Jane Bulley* and *Thomas Potter* appealed from this order. The appeal was heard on the 10th of April.

Argument.

Sir *H. Jackson*, Q.C., and *Romer*, for the Appellants:—

We say that *John Bulley* was only defending in respect of his own beneficial interest.

[JESSEL, M.R., referred to *Bailey v. Birchall* (1).]

That only proceeds on the principle that those who get the benefit must pay. *Berrie v. Howitt* (2) is in our favour.

24/10/89 [JESSEL, M.R.:—I doubt the soundness of that decision; but supposing it correct, it merely turns on the fact of the estate having been an estate tail, the owner of which died after the suit and before the charging order was applied for.]

We submit that the case goes on the principle that the lien is only on the client's interest: *In re Keane* (3). The costs, so far as they exceeded those of an ordinary ejectment, were personal costs. If *John Bulley* had not purchased from the Plaintiff she could not have come into equity at all, and how can *John Bulley* say that costs of a suit, which could not have been brought but for a contract entered into by him for his own personal benefit, are costs incurred by him as trustee? He had only a dry legal estate in him; he was not a trustee with duties to perform, and therefore cannot be considered to have been defending as a trustee.

Swanston, Q.C., and *Everitt*, for the Petitioners, were not called on.

Judgment, C. A. JESSEL, M.R.:—
Jessel, M.R.

I think that the order complained of ought to be affirmed.

The point really decided by the Vice-Chancellor was this. There was an ejectment bill brought by the Plaintiff in *Bulley v. Bulley* against the Defendant *John Bulley* to recover fifteen

(1) 2 H. & M. 371. 11/10/89 (2) Law Rep. 9 Eq. 1.

(3) Law Rep. 12 Eq. 115, 122.

acres of land. That the bill was an ejectment bill is perfectly plain on reading it, and the Plaintiff came into equity because she alleged that the legal estate was outstanding. As the law then stood, if it had not been outstanding, her remedy would have been a common action of ejectment. *John Bulley* was a devisee of trust estates under the will of *William Bulley*, who was the sole trustee under the will of *Richard Bulley* the younger. *Richard Bulley* the younger had devised the estate in question along with certain copyhold property to *William Bulley*, his heirs and assigns, upon trust to pay an annuity of £40 to his wife for life, to divide the residue of the rents amongst five people, including *William Bulley*, and after the death of the wife, upon trust to sell and divide the proceeds among five persons, of whom the Plaintiff was one, with a discretionary power to postpone the sale. *John Bulley*, as such devisee, became, therefore, trustee of the estate under *Richard Bulley's* will, and as such trustee he entered into possession, and divided the rents amongst the parties entitled in fifths, including the present Appellants. They took their shares from *John Bulley* as such trustee. In that position of affairs, as I read the Act, 15 & 16 Vict. c. 86, s. 42, r. 9, the Plaintiff, if entitled to sue in equity, was entitled to sue *John Bulley* alone, as being the trustee representing the estate. I am also of opinion that it was the proper form of suit not to join the other *cestuis que trust*. There is now no possibility of argument, and it is hardly worth while dwelling on law which is no longer law, because under the new rules it is plain that a trustee is exactly in the same position as an executor or administrator who is the only proper party to an action at the suit of third parties seeking to recover property. That being so, the question arose whether there was a sufficient right established on the part of the Plaintiff to maintain the bill, and that depended on a question of very considerable nicety—whether certain general words in a conveyance by the Plaintiff would have passed the legal estate from her, supposing her to have been entitled to the legal estate. The cause having come before the Lords Justices on appeal, they decided that there was sufficient equity to maintain the suit, and having so decided, they then considered the case on its merits, and decided that the Plaintiff's contention failed. They therefore

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established in effect the title of *John Bulley* as trustee under the wills I have mentioned, and the title also of the *cestuis que trust* claiming under those wills. The result, therefore, was a determination in favour of everybody claiming under those wills adversely to the Plaintiff's contention, who claimed an estate tail under a title paramount. That being so, the whole of the property was preserved by the solicitor of *John Bulley* from the attack made upon it by the Plaintiff in the suit of *Bulley v. Bulley*, who claimed the whole; and even if we are to construe the Act as contended on the part of the Appellant, by saying that the property to be preserved must be the property of the client of the solicitor, even in that narrow view of the Act, to which I am by no means prepared to assent, still this order would be right, because the whole estate was the property of the Defendant as trustee, and as being the person who was to defend it in the suit. Therefore I should have been of the same opinion, even if I had so limited the Act of Parliament, and it appears to me that the view taken by the Vice-Chancellor is correct. The object is to secure to the solicitor his costs out of that property which has been preserved by his exertions. What can it matter to him that other persons have derivative titles to the property? If this had been a term of 1000 years vested in an executor, nobody would have dreamt of raising this contention. It would not have mattered how many legatees, residuary or otherwise, had been interested in the property, the solicitor of the executor who had successfully defended the property would have got his costs out of it. Now, as I understand the matter, a trustee is in exactly the same position as an executor, and every argument which has been urged on the part of the Appellants to shew the difficulties and mischiefs which might possibly arise, would equally apply to the case of an administrator or executor, as to which the law has been settled from time immemorial.

Therefore it appears to me that this appeal is entirely unfounded, and that it ought to be dismissed.

James, L.J.

JAMES, L.J. :—

I am of the same opinion, and I think the point almost too clear for argument. The Act of Parliament says in so many

words that the solicitor shall be entitled to a charge upon the property which is recovered or preserved. A trustee is a person whose duty it is to preserve the property. He is the owner of the property for this purpose, and he represents the *cestuis que trust*. As he represents the *cestuis que trust* his solicitor is the solicitor representing the *cestuis que trust*, and he represents the *cestuis que trust* for the purposes of this application.

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COTTON, L.J. :—

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I am also of opinion that the decision of the Vice-Chancellor was right.

The question turns upon the construction of sect. 28 of the *Solicitors Act*, with reference to the particular facts of the case. That section does not say that a charge is to be given against the interest of the parties by whom the solicitor is employed, but that when the solicitor is employed to prosecute or defend any suit it shall be lawful to the Court to give him a charge for his costs, charges, and expenses, on any property recovered or preserved (preserved is the material word here), through the instrumentality of any such attorney or solicitor. Of course it means preserved by his defence to the suit. In the present case the Plaintiff claimed by title paramount to the will under which the property was vested in the Defendant *Bulley*, and if she was right there was no power at all in the testator under whom Mr. *Bulley* claimed, to devise the property. Can the trustee be considered, or ought he to be considered, as representing in the suit all parties beneficially interested? But for an accidental circumstance this would have been an action of ejectment at law, and in that form of proceeding he clearly would have been the only person who could have been made a party to the litigation. In equity, having regard to the Act 15 & 16 Vict. c. 86, s. 42, r. 9, he sufficiently represented all the parties beneficially interested, subject to the right of the Court, if it thought fit, to direct that some or one of them should be made parties or a party. It was urged, could a decision against the Defendant in that suit prevent or bar any right which the *cestuis que trust* might have by reason of some personal equity against the Plaintiff? Clearly not. All that the suit could decide would be whether

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or not the claim of the Plaintiff was good as against the estate, leaving untouched all equities which any other particular person might raise against her, the Plaintiff. But the claim made by the Plaintiff was a claim which would have swept away the estate from under the wills under which the Defendant *Bulley* claimed. He under those wills had the estate vested in him as trustee, and in his answer he says that he entered into possession as trustee, and dealt with the rents of the property as trustee. I have no doubt therefore that his defence in this suit was a defence for the benefit of all those interested in the estate, and the estate was preserved to them by defeating the claim of the Plaintiff in this suit. The whole estate therefore comes within the meaning of the Act of Parliament.

Solicitors for Petitioners: *Digby & Jones.*Solicitors for Respondents: *Lattey & Hart.*

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April 5.

In re CHENNELL.
JONES *v.* CHENNELL.

[1876 C. 400.]

Appeal for Costs—Judicature Act, 1873, ss. 19, 49—Rules of Court, 1875, Order LV. Further Evidence on Appeal—Order LVIII, r. 5—Investment of Trust Money on Leaseholds—Costs of Suit.

A mortgagee of a share of the proceeds of a real estate devised in trust to sell and to invest the proceeds in government or real securities commenced an action against the mortgagor and the trustee of the will alleging that the money had been invested upon improper securities. An order was made directing accounts and inquiries, and reserving further consideration. Shortly afterwards the trustee paid into Court the amount of the mortgaged share, and paid to the other beneficiaries their shares. The certificate found these payments, and as to the mode of investment stated simply that the money had been invested on mortgage of leaseholds. On further consideration the Plaintiff did not give notice to read the evidence used in Chambers. *Hall, V.C.*, declined to hear the evidence taken in Chambers, *held* that on the finding in the certificate the investment was not shewn to be improper, and that the action was unnecessary, and made an order giving the trustee his costs, and costs, charges, and expenses out of the fund in Court:—

Held, by the Court of Appeal,

1. That as the order gave the trustee costs, charges, and expenses, not

130 Ch D 653.
14 Ch D 626
22 Ch D 492
24 Ch D 276

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being costs of suit, it was not simply an order as to costs within the discretion of the Court, and was subject to appeal :

2. That the case was one where leave to adduce further evidence on the appeal ought to be given, so as to bring before the Court full information as to the nature of the investments :

3. That under a trust to invest in real securities an investment on mortgage of leaseholds is improper, unless the leaseholds are for a long term of years at a peppercorn rent without onerous covenants :

4. That the order of the Vice-Chancellor as to costs being made on the ground, which was established, that the fund never had been, nor had been believed by the Plaintiff to be, in danger, and that the action was therefore unnecessary and improper, ought not to be interfered with ; and that as the other beneficiaries had had no benefit from the action, the costs were properly payable out of the Plaintiff's share.

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JOHN CHENNELL, by will dated the 18th of November, 1848, gave a tenement called *Beach Cottage* to the use of *Pepper* and *T. M. Chennell* in fee upon trust to pay the rents to *Jane Elizabeth Langford* for life, and after her death upon trust for her children then living, and the issue then living of any child or children of hers then dead, in equal shares *per stirpes*. And he empowered his trustees or trustee, if they or he should think it advantageous so to do, to sell and dispose of his said messuage and premises called *Beach Cottage* by public auction or by private contract, and he directed that the moneys to arise by such sale should be invested in government or real securities in *England* ; and that the said trustees or trustee should hold the stocks, funds, or securities whereon such investments should be made upon the trusts therein before declared concerning the said messuage and premises.

Statement.

The testator died in 1854, and *Pepper* some time afterwards. In June, 1875, *T. M. Chennell* sold *Beach Cottage* for £2460.

On the 7th of September, 1875, *T. M. Chennell* advanced to *F. Cruttenden*, out of the purchase-money, four sums of £600 on four separate mortgages by assignment of four leasehold messuages in *Carisbrooke Road* at *Hastings*. Each messuage was held by *Cruttenden* under a lease dated the 1st of September, 1875, for a term of ninety-nine years from the 25th of March, 1874, except the last three days thereof, at the yearly rent of £10. By each of these leases *Cruttenden* covenanted to complete the house and make it fit for habitation within six months to the satisfaction of the lessor's surveyor, to pay a fair proportion of the

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expense of making roads and drains and keeping them in repair, and entered into other covenants commonly contained in leases of houses. There was a proviso for re-entry on non-payment of rent or breach of any of the lessee's covenants. It was, however, shewn that notwithstanding the covenants to complete contained in the leases, the houses had all been finished fit for occupation by July, 1875, and were all in the occupation of tenants before the end of that year.

In the meantime, by indenture dated the 22nd of July, 1875, *W. F. Dangerfield* and *Alice Gertrude* his wife, one of the children of *Jane Elizabeth Langford*, mortgaged Mrs. *Dangerfield's* interest in *Beach Cottage* and the proceeds of its sale to the Plaintiff, *Richard Jones*, to secure £200. Notice of this mortgage was given to *Chennell* on the 28th of August, 1875.

*Jane Elizabeth Langford* died on the 8th of November, 1876. She left six children, and no issue of any deceased child.

Upon her death the Plaintiff's solicitor, *R. B. Jones*, applied to *Chennell* to know how the money was invested, and on being informed that £2400 was on mortgage, applied for a copy of the mortgage. On the 29th of November, *Chennell's* solicitor sent a copy of one of the mortgages. On the 12th of December the following four telegrams passed: *R. B. Jones* to Mr. *Dawes*, *Chennell's* solicitor: "Will you undertake to appear for Mr. *Chennell* to process as to *Beach Cottage*, or shall it go to him?" *Dawes* to *R. B. Jones*: "*Chennell*, I do not know what process you mean. You can send it me, and I will write you by return." *R. B. Jones* to *Dawes*: "Writ to administer estate of *John Chennell* deceased. My instructions are to serve Defendant if you do not wire undertaking." *Dawes* to *R. B. Jones*: "*Chennell*. Send me writ. I undertake to serve it or accept service by Thursday next."

On the same 12th of December, *R. B. Jones* wrote to *Dawes*: "As Mr. *Dangerfield* is unable to pay my client his mortgage-money and interest, and you refuse to divide the money, the proceeds of the sale of *Beach Cottage*, I have no other alternative than to proceed to administer the estate, and herewith you have writ of summons for that purpose for your undertaking to appear for your client, Mr. *T. M. Chennell*. Please return writ with undertaking by return."



*Dawes* replied on the 13th: "I have received this writ, and will serve it to-morrow or accept service as stated in my telegram. I must express my surprise at the course you are taking, as you must know full well that a mortgagor is entitled to six months' notice before he takes his money. This has been given, and the money would have been divided without delay." The writ was accordingly served on the 14th. *Dawes* on the 19th wrote to *R. B. Jones*, asking whether the matter could not be settled without the expense of an action, and what was the amount of the Plaintiff's claim. To this no answer was returned.

The statement of claim was against *T. M. Chennell*, and *Dangerfield* and wife. It alleged that the purchase-money of *Beach Cottage* was received by *Chennell*, and invested by him after the date of the mortgage upon improper securities, and that there was danger that the same might be lost. There was no more specific allegation as to the nature of the investments. The Plaintiff claimed an account of what was due on the mortgage, and foreclosure in default of payment, and that the trusts of the testator's will, so far as related to the proceeds of sale of *Beach Cottage*, might be administered by the Court.

On the 16th of January, 1877, an order was obtained under Rules of Court, 1875, Order xv., directing an account of what was due on the mortgage, an inquiry when the tenant for life died, what children she left, and what issue of any deceased children, and whether any of them had incumbered their shares; an account of the proceeds of sale of *Beach Cottage* come to the hands of *Chennell*, or of any other person or persons by his order or for his use, and an inquiry on what securities the proceeds of sale were invested, further consideration being reserved.

On the 19th of January, *Chennell* paid to the other five children of the tenant for life their respective shares of the proceeds of sale of *Beach Cottage*, and on the 14th of February, 1877, under an order obtained by him for that purpose, he paid into Court in this action,—“The account of the Defendants *W. F. Dangerfield*, and *Alice Gertrude*, his wife, and their incumbrancers,” the sum of £400 12s. 4d. being the amount of Mrs. *Dangerfield*'s share with a trifling exception noticed hereafter.

The Chief Clerk in consequence of the above payments having

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been made, directed that no service of the order should be made on the other children of the tenant for life, and the proceedings were attended only by the Plaintiff and the Defendants.

The Chief Clerk by his certificate, dated the 7th of July, 1877, certified that on the 2nd of February, 1877, *Dangerfield* and wife had for value assigned Mrs. *Dangerfield's* share of the proceeds of *Beach Cottage* to the Plaintiff absolutely. As regarded *Beach Cottage* he certified "The proceeds of the sale of *Beach Cottage* amounted to the sum of £2460, which sum was received by the Defendant *T. M. Chennell*, who thereout on the 7th of September, 1875, advanced the sum of £2400 to *F. Cruttenden*, on mortgages of leasehold houses at *Hastings*, and placed the sum of £7 in the *Rye Savings Bank* on deposit, and applied the balance in payment of the costs of the said sale, and in expenses of the trust." The Chief Clerk proceeded to certify the payments made by *Chennell* as above-mentioned to the parties interested, and other smaller payments made by him, and that he had deducted £6 4s. 4d. from *Chennell's* first item of disbursement, and that there remained due from him £6 9s., of which 4s. 8d. was retained as a balance of interest due to the estate of the tenant for life.

The action came on for further consideration before Vice-Chancellor *Hall* on the 5th of November, 1877. The Plaintiff did not give notice to read any of the evidence which had been used in Chambers, and the only information before the Court as to the nature of the investments was the above statement in the certificate, that the money had been advanced on mortgages of leasehold houses at *Hastings*. The Plaintiff proposed to read the evidence which had been used in Chambers to shew the nature of the securities, but no notice to read it having been given, the Vice-Chancellor refused to receive it.

Argument.

*Morgan*, Q.C., and *Cozens-Hardy*, for the Plaintiffs :—

The security was an improper security and the trustee is liable for any loss and for the costs of a suit to replace the fund: *Byrne v. Norcott* (1), *Budge v. Gummow* (2), *Thorp v. Holdsworth* (3). The costs, at all events, cannot be thrown on the Plaintiff's share:

(1) 13 Beav. 336.

(2) Law Rep. 7 Ch. 719.

(3) 3 Ch. D. 637.

*Hilliard v. Fulford* (1). The investment was improper, for though an investment in leaseholds for a long term of years without any burdensome covenants or proviso of re-entry might be allowable, such a security as this is not: *Fuller v. Knight* (2); *Townend v. Townend* (3); *Vyse v. Foster* (4). Then *Chennell* chose to make payments to the other five tenants in common after the order for accounts had been made, and he at all events cannot retain, out of the fund in Court, his costs, which properly fall on the entirety of the estate.

*Grosvenor Woods*, for the *Dangerfields*.

*W. Pearson*, Q.C., and *Whitehorne*, for *Chennell*:—

The question here is not whether there was a technical breach of trust or not, but a question of costs only. If there be a breach of trust and a suit be instituted to compel the trustee to make it good, then the trustee will be liable for all the costs so far as they relate to making good the breach and no further. This is not an action for making good a breach of trust at all and that the correspondence shews. The statement of claim does not pray for that. It is a mortgagee's action for administration and for accounts. The trust moneys were paid on the 19th of January. There was really no necessity for the action and there has been no loss to any one: *Bate v. Hooper* (5). *Royds v. Royds* (6) was a much stronger case. This trustee ought not to be deprived of his costs. He paid five of the parties their shares of the funds, and the one sixth, of which the Plaintiff was a mere mortgagee, he paid into Court. The Plaintiff was not absolutely entitled to be paid before the 2nd of February, 1877, and he is not entitled to be paid any costs.

*Morgan*, in reply.

HALL, V.C.:—

This is an action brought by *R. Jones*, a mortgagee of one of the children of *J. E. Langford*, of a sixth share of property called

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(1) 4 Ch. D. 389.

(4) Law Rep. 8 Ch. 309.

(2) 6 Beav. 205.

(5) 5 D. M. & G. 338.

(3) 1 Giff. 201.

(6) 14 Beav. 54.

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*Beach Cottage*, which was upon her death to be sold and divided among her children. *J. E. Langford* died on the 8th of November, 1876, and this action was brought on the 11th of December, 1876, about a month afterwards. The statement of claim asks for an account of what is due, for payment, and in default for a foreclosure; the Plaintiff also asks that the trusts of the will, so far as they relate to this share, may be administered, and there is a prayer for general relief.

The order was made under Order xv. on special application and the usual inquiries were directed. The statement of claim was received by the Defendant after the date of the order. The Plaintiff's allegation is that the money was invested upon an improper security. The certificate finds that on the 17th of February the Plaintiff bought the equity of redemption on a sixth share of the property, and also finds who the children are and the amount of the proceeds of sale of the property, and that it was received by *Chennell* and advanced to *Cruttenden* on mortgage of a leasehold property at *Hastings*. The amount was paid on the 19th of January, and three days after the order in the action *Chennell* paid off the money. It is said that that shews he did wrong, but I cannot assume that he did that. I can understand that a trustee who takes a security of this kind might be willing to bring litigation to a speedy end and therefore pay off the money himself. But in January, a very few days after the order in the action, he paid all the parties, except the Plaintiff, what they were entitled to, and the Plaintiff became entitled to the share mortgaged to him by buying the equity of redemption. It is contended that upon the form of order, statement of claim, and certificate, it must be taken that the Defendant, a trustee, committed a breach of trust by having invested the trust moneys upon an improper security, *i.e.*, upon a leasehold house, and that that is enough in itself, coupled with the fact of his paying off the parties so suddenly, to shew that he knew it was an improper investment. This is an action to make the trustee liable for making that improper investment. As regards the security being a leasehold house, and therefore improper, notwithstanding the passage which has been read from the judgment of Vice-Chancellor *Stuart* in *Townend v. Townend* (1), it



does not appear to me, looking at the circumstances of that case, to be a decision of the Vice-Chancellor upon the general question, and I decline to lay down a rule that in no case can trust money be laid out on leasehold security under a trust or power to invest on real securities. The ordinary mode of raising portions under a settlement of land settled in strict settlement is by mortgage of a term of years created for the purpose. The security there is leasehold.

I see nothing in the Chief Clerk's certificate which would justify me in charging this trustee with a breach of trust, the money having been forthcoming, and there is nothing to shew me that in the due course of six months the money would not have been realized by a sale of the property itself. The Defendant, therefore, is in the position of being an ordinary trustee, and as such he is entitled to all his costs incurred in the administration action. Then it was contended that he had pursued a wrong course in distributing a portion of the funds and in not allowing the action to go on, and having the costs paid out of the estate by the Court. But, having regard to the form of the order taken by the Plaintiff, I do not conceive that he took an administration which applied to the whole of the trust estate, or that he put the estate in a position of having the whole of the accounts gone into. He has never taken the opportunity of shewing that the other *cestuis que trust* ought to be here, or that they attended upon the inquiries and accounts in Chambers. They at least have not derived any benefit whatever by this action, and they have been willing to take their shares of the money, and there has been no improper payment to them. This case is very different from the one before the Master of the Rolls, but every case must be judged by its own circumstances. It is clear that the other five parties do not desire any litigation, and as regards the Plaintiff, he not only brought an action very speedily after the death of the tenant for life, but at a time when there was really no necessity whatever for so doing. I can see no reason why, in respect of his claim, there should have been any action at all. He might have got all he wanted without litigation. There was no necessity for the action, and under these circumstances I hold that the costs of the trustee out of the five sixths ought to be disallowed, but they must not be borne by him personally. The five parties, however, as it

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C. A. seems to me, ought to be relieved of them. The Plaintiff must be taken to have known what the costs of the litigation would be, and the proper course will be to order that the costs of the trustee, as between solicitor and client, be paid in the ordinary way out of the fund in Court—the one sixth—and that the balance be paid over to the Plaintiff.

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The order made accordingly was that the costs of Defendant *Chennell* of the action should be taxed as between solicitor and client, including in such costs any costs, charges, and expenses properly incurred by him as trustee of the will; that the bank annuities in Court should be sold, and that out of the money to arise from such sale, and a small sum of cash in Court, the costs when taxed, after deducting the £6 9s. found to be due from *Chennell*, should be paid to his solicitors, and that the residue of the money should be paid to the Plaintiff.

C. A. The Plaintiff appealed from this order, and gave notice to the Defendants that on the hearing of the appeal he should apply for leave to adduce further evidence as to the investments. The appeal came on to be heard on the 20th of March, 1878.

Argument.

*W. Pearson*, Q.C., and *Whitehorne*, for *Chennell*, took a preliminary objection:—

This is an appeal for costs only, and will not lie: *Judicature Act*, 1873, s. 49; Rules of Court, 1875, Order LV. The only subject of the appeal is that the Vice-Chancellor has ordered the trustee's costs to be taxed and paid out of the fund. It is the converse of *In re Hoskin's Trusts* (1). Before the Act, where the Court deprived a trustee of costs there was no appeal: *Taylor v. Dowlen* (2), and *In re Hoskin's Trusts*, under the Act, is to the same effect. According to *Angell v. Davis* (3), there were only three exceptions from the rule that there could not be an appeal for costs, and this does not come within any of them.

[JESSEL, M.R.:—It is of no use to refer to cases before the Act. Here is an order which we have to construe, and it is

(1) 6 Ch. D. 281.

(2) Law Rep. 4 Ch. 697.

(3) 4 My. & Cr. 360.

fallacious to refer to the old practice, and ask whether the order has altered it.]

*Morgan, Q.C., and Cozens-Hardy, contra :—*

This is not an appeal for costs only; it is an appeal from an order directing a fund to be applied in payment of costs—an order disposing of property, *Taylor v. Popham* (1), and is not within sect. 49. Then, moreover, it directs payment of costs, charges, and expenses which are not costs within the discretion of the Judge, as is shewn by Order LV. [They were here stopped by the Court.]

*W. Pearson, in reply :—*

According to the Appellant's argument his appeal is wrong in form. It ought to be an appeal against so much of the order as directs payment of the costs out of the fund. Then as to the costs, charges, and expenses, sect. 49 does not purport to be confined to costs of suit. Costs, charges, and expenses are costs for which a trustee has a lien on the fund, and when the case comes before the Court it is as much in the discretion of the Court to deprive him of them as of the costs of suit. The section as to appeals is worded broadly enough to include such costs among the costs there mentioned. *Harris v. Aaron* (2) shews how strongly the rule against appealing for costs is enforced.

JESSEL, M.R. :—

The question we have to decide is whether an appeal lies in this case which is from an order for taxing and paying the costs of the Defendant, as between solicitor and client, including in such costs any charges and expenses properly incurred by the Defendant as trustee of the will. In my opinion that depends entirely upon the Act of Parliament, and the rules which are part of it. Under the *Judicature Act*, 1873, s. 19, every order is appealable unless we find some provision that it is not to be subject to appeal. It is for the litigant who asserts that an order is not appealable to shew some section or rule which prohibits an appeal. The Respondent relies on sect. 49, which enacts that "No order made by the High Court of Justice, or any Judge thereof, by the

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(1) 15 Ves. 72.

(2) 4 Ch. D. 749.

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consent of the parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or Judge making such order." The 55th Order has been read to shew what costs are referred to as being in the discretion of the Judge.

Now, first of all we have to consider what is an order as to costs only. In my opinion an order is not the less an order as to costs only because it goes on to direct how the costs are to be paid, whether out of a fund, or by an individual, or by a corporation, or in any other manner. The mode of payment is a mere incident, for no order as to costs would be of any use unless there were some mode or other of enforcing it. But then there comes another question. What are costs which by law are within the discretion of the Court? Now, we have upon that the provision in the 55th Order, "Subject to the provisions of the Act, the costs of, and incident to, all proceedings in the High Court shall be in the discretion of the Court." The charges and expenses of the trustees are not costs incident to proceedings in the High Court, and therefore are not within those words, and consequently are not by this Order left to the discretion of the Court. Then are the charges and expenses themselves by law left to the discretion of the Court? Are they costs left to the discretion of the Court? Now, in the first place charges and expenses are not, properly speaking, costs at all. The words are used because they include items which are not costs. Therefore, if the word "costs," taken alone, does not include charges and expenses, why should we treat it as including them? It is quite true that in one sense charges and expenses are in the discretion of the Court, but not in the ordinary sense. The Court has a discretion to deprive a trustee of them for gross misconduct. That is the only discretion the Court can exercise. They are not like the ordinary costs of an action in the mere ordinary discretion, or even in the mere discretion of the Court. It is, if I may use the term, a violent exercise of the Court's discretion to deprive a trustee of his charges and expenses. Such a case is a singular and extraordinary case, and whether we look to the mere wording of the section and rule, or to the presumable reason of the thing, it can hardly be supposed that the Legislature intended to include such a case in its prohibition of an

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appeal. I think, therefore, that this appeal is not prohibited by the statute, and must proceed.

COTTON, L.J. :—

I am of the same opinion on this ground, that charges and expenses of a trustee are not, in my opinion, costs within the meaning of the 49th section. They are not costs of proceedings or costs in an action, but they are certain expenditure which the trustee claims to have paid to him by his *cestui que trust*, and payment of which he claims to enforce by means of a lien upon the property, that is, a right to retain it until they are paid. A trustee can only be deprived of them when the Court holds that he has done some act in consequence of which the *cestui que trust* is entitled to have the property conveyed to him without satisfying that lien to which *primâ facie* the trustee is entitled. In my opinion "charges and expenses" looked at in that light are not costs left to the discretion of the Court within the meaning of the 49th section of the Act of Parliament, and they certainly are not costs of proceedings in Court within the meaning of the Order LV. We must therefore go on with this appeal.

I should add, that I quite agree with what the Master of the Rolls has said, that as regards costs of proceedings an order is not less an order for costs only, because the Court, having exercised its discretion as to giving or withholding the costs of proceedings, goes on to direct that instead of being paid personally by one of the parties they shall be paid out of the particular fund.

THESIGER, L.J. :—

I am of the same opinion.

March 27. *Morgan, Q.C.*, and *Cozens-Hardy*, for the Appellant :—

The action is brought on the ground that the trustee committed a breach of trust by investing the trust fund on mortgage of leaseholds. The Vice-Chancellor has held that such an investment is an investment on real security.

[JESSEL, M.R. :—I do not think that the Vice-Chancellor meant to decide that an investment on leaseholds is *primâ facie* autho-

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rized by a trust to invest on real security, but only that it is not necessarily improper. In former times, an owner in fee generally mortgaged by granting a term, and if such a security would be proper it would be difficult to say that a mortgage by assignment of a long term at a peppercorn rent without impeachment of waste was an improper security.]

Here the leaseholds were subject to burdensome covenants and to a proviso for re-entry on breach of them.

[JESSEL, M.R. :—There was no evidence of that before the Vice-Chancellor.]

We submit that on coming before the Court we were entitled to use the evidence which was before the Judge in Chambers.

[JESSEL, M.R. :—Certainly not, unless you gave notice to read it.]

Then, under Order LVIII., rule 5, we ask for leave to adduce further evidence.

[JESSEL, M.R. :—I am not clear that the rule applies to such evidence as this.]

*W. Pearson, Q.C., and Whitehorne, contra :—*

A special application to allow fresh evidence to be read is necessary so that the other side may have an opportunity of meeting the case. The evidence here is evidence which the Plaintiff had in his possession and ought to have brought forward below. As he did not do so, he ought not to be allowed an opportunity of adducing it now.

*Morgan, in reply :—*

We followed *Hastie v. Hastie* (1). Surely we are not to be in a worse position as to adducing evidence because it is already on the file.

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It is singular that in this case we should again be called upon to put a construction upon one of the General Orders. We have now to consider the effect of Order LVIII., rule 5. The first ques-

tion to be decided is, what is the meaning of the words "further evidence"? In my opinion they mean evidence not used at the trial or hearing in the Court below. I think that this appears quite obvious if we consider the meaning of the rule. All appeals are by way of rehearing, that is by trial over again, on the evidence used in the Court below; but there is special power to receive further evidence. I must say, at the risk of repetition, that these words appear to me to mean any evidence whatever not used at the trial. If that is so, it can make no difference that the evidence in question has already been used in the same cause, or in any other cause between the same parties, so that it could have been read or used in the Court below simply upon giving notice, it still was evidence not used before the Court below.

That being so, we come to the next point. This is an appeal from a judgment after trial, a judgment upon further consideration, and a party can only adduce such evidence upon special grounds, and not without special leave. Now, in this case, notice was given that special leave would be asked when the case came on before the Court. Of course the Court might give the special leave upon that notice. It is not requisite, though it is sometimes convenient, and it is always expensive, to give a separate notice of motion for leave to have further evidence heard, and it is generally more convenient that the Court should know something about the case before it decides upon such a motion. And, therefore, the course pursued in the first instance is, as a general rule, more convenient, and certainly less expensive than giving a separate notice of motion. I think, therefore, that we are entitled to entertain the application upon such a notice.

The next question is, whether there is here a sufficient special reason. It is impossible to lay down *à priori* what will be a sufficient special ground. At the same time, my opinion is that the Court should be very cautious about admitting further evidence, and it is not by any means to be admitted as a mere matter of course, but there should be a strong reason given for admitting it.

Now, what is the case here? The question is a question of

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costs depending on the conduct of the Defendant. Evidence as to that conduct had been gone into at Chambers, but of course it would not appear upon the certificate. According to the practice of the Court, the Appellant was not entitled to read this evidence without giving notice to the other side; the object of requiring such notice being to provide in the first place that the other side should be prepared to meet the evidence, and in the next place to provide for the costs occasioned by briefing that evidence, since, as a general rule, neither side would be entitled to put into his brief, on further consideration, the evidence used before the Judge in Chambers. That notice was not given, but the Appellant endeavoured to read the evidence, and tendered it in the Court below. It was rejected upon the ground of want of notice. It is disputed whether or not the counsel for the party desiring to use that evidence did or did not ask for an adjournment; but in my opinion the Judge below ought to have granted the adjournment as a matter of course, without being asked for it. It is not the duty of a Judge to throw technical difficulties in the way of the administration of justice, but where he sees that he is prevented from receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way, upon proper terms as to costs and otherwise. I have known an objection taken at the trial to the admission of a document which everybody knew to be a genuine one, and I have known the Judge say to the person taking the objection, "I will adjourn the cause, but reserve the costs," and thereupon the objection has been withdrawn. That I have seen more than once, and I cannot help thinking that if the Judge in the Court below had offered the adjournment, the other side would have allowed the evidence to be read. It appears to me that a case of this kind, where evidence which had been before the Judge in Chambers was excluded by this kind of technical objection, affords a special ground why it should be admitted in the Court of Appeal, and for that reason I think it should now be admitted.

COTTON and THESIGER, L.JJ., concurred.

Statement.

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Some discussion then took place as to whether the Respondent



should be allowed to adduce any evidence in opposition to the fresh evidence thus adduced, and it was arranged that he should.

April 5. The evidence used before the Chief Clerk and some further evidence was read, and the nature of the leasehold property was shewn to be as above stated. The Plaintiff had given evidence that he inspected the property in December, 1877, and that the houses were then unfinished, and workmen going in and out; and that they were a class of property on which he "would not advance any money whatever, much less trust money." There was on the other side evidence that the houses were finished, fit for occupation, before the mortgage was made; but that some repairs were required in December which accounted for workmen being about them. The evidence as to value went to shew that the security was adequate, and that the fund had never been practically in danger. The trustee had obtained the money for making the payments to the parties by transferring the mortgage, which he deposed that he had had no difficulty in doing. It appeared that the Plaintiff was a solicitor, and his address was the same as that of his solicitor in the action.

*Morgan, Q.C., and Cozens-Hardy, for the Appellant:—*

The question is whether this security was justifiable under a trust to invest on real security. If the affirmative is decided the result will be very important, having regard to the Act 22 & 23 Vict. c. 35, s. 32, which enables any trustee to invest on real security, if the instrument under which he acts does not forbid it. The Vice-Chancellor held that *primâ facie* a leasehold security was good.

[JESSEL, M.R.:—I always understood that a leasehold security was *primâ facie* an improper investment of trust money, and that it lay on the trustee to justify it. It would be justified if the leaseholds were held at a peppercorn rent for a long term, without covenants and without impeachment for waste, a mortgage of which was held by Vice-Chancellor *Shadwell*, in an unreported case, to be a proper security for trust money.]

Here the security is very objectionable. The mortgages are by assignment, so that the mortgagee is liable on the covenants. An

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C. A. investment on mortgage of leaseholds is improper generally : *Hill*  
 1878 on Trustees (1); *Townend v. Townend* (2); *Lewin* on Trusts (3);  
 In re *Fuller v. Knight* (4). The suit has been occasioned by the  
 CHENNELL. default of the trustee, and he ought to pay the costs of it: *Byrne*  
 JONES v. *Norcott* (5). The costs, if given, ought not to be given wholly  
 v. out of this share, the executors *pendente lite* having denuded  
 CHENNELL. themselves of the other shares: *Hilliard v. Fulford* (6).

*W. Pearson, Q.C., and Whitehorne, contra*, were not called upon.

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 Jessel, M.R.

The present appeal raises two points. One is a point of general importance, as to which I should like to state my opinion, and I believe the opinion of the Lords Justices is the same, viz., that, as a general rule, a trustee empowered to lend money upon real securities is not entitled to lend the money upon mortgage of a leasehold estate. By that I mean that *prima facie* it is a breach of trust. Therefore, if that had been the only point to be decided, or the only question before us, it is possible that we should not have concurred in the opinion of the Vice-Chancellor; but this is an appeal substantially for costs. It is true that by reason of charges and expenses having been included it is not within the express terms of the Act of Parliament, and we therefore held that an appeal would lie; but still, if I may say so, it is within the spirit of the enactment that there shall be no appeal for costs, and the Court is not lightly to interfere with the discretion of a Judge in disposing of costs, especially when he bases his decision, as the Vice-Chancellor did in this case, upon the conduct of the parties. Now the Vice-Chancellor came to the conclusion that the action was hastily and improperly instituted, and also was not properly conducted. Having arrived at that conclusion he gave the Defendant his costs as against the Plaintiff by allowing them to be deducted out of the share to which the Plaintiff was entitled.

I see no reason for dissenting from his conclusion, or from the

(1) Page 375.

(2) 1 Giff. 201. *5/12 18507*

(3) 6th Ed. p. 269.

(4) 6 Beav. 205.

(5) 13 Beav. 336.

(6) 4 Ch. D. 389.

reasons upon which he primarily based it, and therefore I think that this appeal should be dismissed.

JAMES, L.J. :—

I am entirely of the same opinion. I think it is very desirable that trustees should be warned that they must not without express authority lend money upon leasehold securities. At the same time, although that is the law, and a person interested has a right to have such an investment set right, the Plaintiff ought not to have filed a bill when the money was immediately payable, and where, as I am satisfied was the case here, the money was never in the slightest danger, nor believed by the Plaintiff to be so. He would, I am satisfied, have had his full share of the money without the slightest difficulty and without any expense; and I believe that this action would not have been brought if he had not read some books on trusts, and thought that he, being a solicitor, would make a little profit out of it.

I think the Vice-Chancellor was quite right in not indulging him.

THESIGER, L.J. :—

I am of the same opinion.

Solicitor for Plaintiff: *Richard B. Jones.*

Solicitors for Defendants; *Kingsford, Dorman & Kingsford.*

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James, L.J.

C. A.

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V.-C. M.

April 30.

C. A.

May 29.

## BROOKE v. WIGG.

[1875 B. 142.]

*Practice—Agreement to take Evidence by Affidavit—Trial without a Jury—  
Rules of Court, 1875, Order xxxvi., r. 26; Order xxxvii., r. 1.*

Where the parties to an action agreed that evidence should be taken by affidavit:—

*Held*, by *Malins*, V.C., that this was equivalent to an agreement that the action should be tried before a Judge without a jury, since affidavits could not otherwise be used except under special circumstances; and the Court refused to direct a trial before a Judge and jury, even in a case peculiarly adapted to be tried before a jury, where the parties had under such an agreement taken affidavit evidence for two years, and had at great expense prepared the action for trial before a Judge alone.

On appeal the order of the Vice-Chancellor was affirmed.

Statement.

THIS bill was filed in April, 1875, by Sir *R. Brooke*, the owner of certain property called the *Norton Priory* estate, near *Chester*, and his eldest son, against the Defendants, who were the owners of chemical works in the neighbourhood, claiming an injunction to restrain the Defendants from permitting the escape from their works of any noxious fumes or other matters of such a nature as to cause injury to the *Norton Priory* estate, or any part thereof, or anything growing, standing, or being thereon. The allegations made by the Plaintiffs were that the mansion-house upon this property was so materially injured by the noxious vapours emitted from the Defendants' works, that it was virtually rendered uninhabitable, and that the growing crops were so much damaged that the farms had become unfit for occupation.

The Defendants, in answer to these charges, while admitting that the Plaintiffs had sustained a certain amount of damage, denied that this damage was caused by their works, and alleged that the injury was caused by the noxious vapours arising from other chemical works, of which there were a great number in the neighbourhood.

The bill having been filed in April, 1875, the answer was put in, in September, before the *Judicature Act* came into operation, and

(1) See *HA (1875) 1017*

1000 D 560  
364  
2000 B 368  
2100 D 125



a further answer was filed in November, 1875, after the commencement of the Act; and it was arranged between the parties that the proceedings in the cause should be continued under the new system. The parties also entered into an agreement in November, 1875, that the evidence should be taken by affidavit, and since that period a considerable number of affidavits had been filed on both sides, which extended to the number of 200 printed pages. The cause, which was originally set down for hearing in the Court of Chancery, had lately been transferred by the Defendants to the Associates' office for the purpose of its being heard before a Judge and jury in the Common Law Division.

A motion was now made on behalf of the Plaintiffs for an order directing the case to be transferred from the Associates' book of the list of actions, and entered for trial in the Registrar's book of actions for trial in the Chancery Division. The motion was heard before Vice-Chancellor *Malins* on the 30th of April, 1878.

*Glasse*, Q.C., and *Henderson*, for the Plaintiffs:—

Whatever right the Defendants might otherwise have had to require this cause to be tried before a jury, they cannot, after agreeing to its being heard upon affidavit evidence, repudiate that agreement and go to trial before a Judge and jury, where the affidavits will be useless. Great expense has already been incurred in filing affidavits on both sides, and the proceedings have been going on for more than two years; all this expense and labour will be thrown away if the action is now to be tried before a jury with *vivâ voce* examination of the witnesses in Court. Under Rules of Court, 1875, Order xxxvi., rule 26, the Court has a discretion in all cases which before the *Judicature Act* came into force were properly within the jurisdiction of the Court of Chancery to order them to be tried without a jury. This is such a case, and the circumstances require that the trial should be continued in this branch of the Court: *Back v. Hay* (1). That a party has no absolute right to a trial by jury in such a case was decided in *Pilley v. Baylis* (2); *Sykes v. Firth* (3). And this Court is quite as likely to arrive at the truth by means of affidavit

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(1) 5 Ch. D. 235.

(2) 5 Ch. D. 241.

(3) 46 L. J. (Ch.) 627. *114 (1877) 18*

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evidence, with cross-examination of the witnesses where requisite, as a jury would upon *vivâ voce* examination of witnesses.

*Aston, Q.C., and Rigby, for the Defendants :—*

By Order XXXVI., rule 3, either party to an action has an absolute right to insist upon having an action tried by a Judge and jury; and the Judicature Acts and Rules of Court do not give power to the Court or a Judge to deprive the Defendant of this right. That rule was laid down in *Sugg v. Silber* (1), and the same rule must apply to cases in the Chancery Division as in the Common Law Divisions. It is sufficient for the Defendant to give as a reason for requiring a jury, that he desires his case to be so tried: *West v. White* (2); and as under the present practice a trial by jury cannot be heard before a Judge of the Chancery Division, actions, if they are to be tried by jury, must be set down in the Associates' list of actions: *Warner v. Murdoch* (3).

No doubt the parties agreed to have this action tried upon affidavit evidence, but that does not prevent the trial from taking place before a jury, and it is provided by Order XXXVII., rule 1, that affidavits may be read at the hearing or trial, notwithstanding that witnesses are examined *vivâ voce*. It resembles the case of *Salvin v. North Brancepeth Coal Company* (4), in which a difficult question of smoke nuisance arose, and there Lord Justice James said, "The only thing which, to my mind, was unmistakably established by the evidence on both sides was the utter worthlessness of affidavit evidence in such a case as this," and he also said he should be loth to stop a great work of the kind there complained of where there was conflicting evidence, except upon the verdict of a jury, which jury would have the opportunity of personally visiting the *locus in quo* and the surrounding district, and before whom witnesses would give their evidence *vivâ voce* in open Court. But even if the affidavits should not be read they will not be useless, since they will form the instructions for the examination of the witnesses at the hearing.

This is an action which especially requires a trial before a jury, since it depends entirely upon conflicting evidence. If this case is

(1) 1 Q. B. D. 362.

(2) 4 Ch. D. 631.

(3) 4 Ch. D. 750.

(4) Law Rep. 9 Ch. 705, 710.

heard before a Judge and jury, it can be tried in the county where the nuisance exists, and this is the only satisfactory mode of arriving at the truth.

*Henderson*, in reply.

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MALINS, V.C. :—

This bill was filed in April, 1875, and the answers were put in in September and November following. The last answer was therefore subsequent to the time when the *Judicature Act* came into operation. The proceedings in the cause continued under the new system, and then came the question how the evidence was to be taken. It has been argued correctly that *primâ facie* all evidence is now to be taken *vivâ voce* under Order XXXVII., rule 1, which says that in the absence of any agreement between the parties and subject to the rules, the witnesses at the trial of any action (which means any action in this branch of the Court or the Common Law Divisions) “shall be examined *vivâ voce* and in open Court, but the Court or a Judge may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be received at the hearing, or trial, on such conditions as the Court or Judge may think reasonable.” Therefore, under Order XXXVII., the parties on each side have a right to require the evidence to be taken *vivâ voce*. There is also under Order XXXVI., rule 1, the right conferred upon each party “to name the county or place in which he proposes that the action shall be tried, and the action shall, unless the Judge otherwise orders, be tried in the county or place so named.” Then rule 2 provides that actions may be tried either before a Judge or Judges, or before a Judge and jury. And rule 4 directs that “if the Plaintiff does not within six weeks after the close of the pleadings . . . give notice of trial, the Defendant may, before notice of trial given by the Plaintiff, give notice of trial, and thereby specify one of the modes mentioned in rule 2; and in such case the Plaintiff, on giving notice within the time fixed by rule 3 that he desires to have the issues of fact tried before a Judge and jury, be entitled to have the same so tried.”

It is perfectly clear that in this case, before going into evidence,

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it was quite competent to the parties to make up their minds whether the evidence should be taken under the old or the new system, and it is admitted that they deliberately made up their minds that the evidence should be taken in accordance with the old system prevailing in this Court, namely, by affidavit. The evidence having been so taken, rule 26 of Order xxxvi. provides that "The Court or Judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury."

Now, there are various reasons that may make it appear to the Court or Judge desirable that that course should be taken. It may be so on account of the nature of the case, as in *Back v Hay* (1), *Pilley v. Baylis* (2), and *Sykes v. Firth* (3) (all of which were my decisions). In *Back v. Hay* the Defendants were charged with fraudulent misrepresentation in the formation of a company, and I thought that was a case to be decided in this Court. *Pilley v. Baylis* was a case for specific performance, and so was *Sykes v. Firth*. In those cases I thought it desirable that they should be tried here, because from the nature of the cases they had always been within the jurisdiction of this Court, and I thought it was the proper tribunal. It may be desirable from the circumstances, and the conduct of parties may sometimes make it desirable, that the trial should take place in this form. It was open to the Plaintiffs and Defendants, before the evidence was gone into, to apply to the Court to have the trial before a jury instead of by affidavit evidence; but they deliberately agreed that the evidence should be taken by affidavit. Now, what is the meaning of agreeing that the evidence in a cause shall be taken by affidavit? I cannot help thinking that it must at least mean this, that the evidence being taken by affidavit is to be available, and that the parties are bound to know that such evidence can only be available, in a case in which there is no jury, because it has been fairly admitted by the counsel for the Defendants that there is no instance to be found up to the present day of affidavits in a case being read before a

(1) 5 Ch. D. 235.

(2) 5 Ch. D. 241.

(3) 46 L. J. (Ch.) 627. *Walsby*



jury except under a special order of the Court, as when a witness is dead, or from illness or other circumstances is incompetent to attend. But to have an immense mass of affidavits filed, and to suppose that they can be of any use before a jury, is a complete mistake. Therefore, it appears to me that when parties agree that the evidence shall be taken by affidavit, it is as plainly implied as if expressed, that the evidence being taken by affidavit, the trial shall also take place before a Judge without a jury.

This agreement has led the parties on either side to file affidavits to the extent of more than 200 closely printed pages, all of which, if I direct a trial before a jury, will be thrown away. And all that the counsel for the Defendants can suggest is that the affidavits might be useful as instructions for counsel at the trial, and for what are commonly called proofs on the part of the Plaintiffs or Defendants.

Now, it is no part of my duty to assist parties in making up their briefs for the trial, nor are affidavits filed in this Court generally used for that purpose. Probably, to the Plaintiffs, who are gentlemen of large landed estates said to be worth £5000 or £6000 a year, and the Defendants, who are large traders, these expenses may be unimportant; but if it is to be the general principle that parties may agree to take the evidence by affidavit, and when it is all taken, and the parties have exhausted their means by taking such evidence, they are to come here as a matter of right and ask the Court to regard it as a nullity and to send the case to a jury, it would, in my opinion, be fraught with the utmost danger to suitors in this Court. I cannot assent to the argument which I have heard on this subject, and if I could, it would only be on the terms of the Defendants paying to the Plaintiffs the costs of taking the evidence in that way. I asked the Plaintiffs' counsel whether they were willing that the case should go to a jury in case the Defendants would pay the costs of the evidence taken by affidavit, but they gave me reasons why that should not be the case. They said that it would involve the Plaintiffs in great additional expense, and probably great embarrassment. They had agreed to take the evidence by affidavit, and that means it is to be taken in such a manner as that it can be used when it is taken, and therefore it is to be used before a Judge without a jury.

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The case before me is one of nuisance. I quite agree with what was said by the Master of the Rolls in the case referred to, and with what I myself said in the case of *Back v. Hay* (1) with regard to *West v. White* (2), that, it being a case of nuisance, it was one peculiarly proper for a jury; and I entirely agree with the argument that this is peculiarly a proper case for a jury, and if an application had been made to me before the evidence was taken, no doubt I should have directed the trial to be before a Judge and jury, and not before me; but where this enormous expense has been incurred, and all this labour has been bestowed upon the affidavits, and the parties are ready to have the cause heard, I cannot decide that all that has been done should go for nothing, and that the trial should take place before a jury. For some time I was under the impression, and I am not entirely relieved from it now, that in such a case as this, where the jury sitting either at *Liverpool* or *Chester* could have a view of the locality, and the witnesses being in the neighbourhood, it would still be desirable that the trial should be at *Liverpool* or *Chester* before a special jury, and I should have been glad, therefore, if the Plaintiffs had agreed that such a course should be adopted; but as that is not agreed to, I must decide upon what I consider to be the effect of the agreement to take evidence by affidavit. If the proper course had been adopted this case would have been heard at the Spring Assizes of 1876; but I cannot put the parties in the same position as they would then have been in, therefore I make an order that this action and all issues of fact arising thereon shall be tried before me, and this being a successful motion in a cause, the costs will become costs in the cause.

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From this decision the Defendants appealed. The appeal was heard on the 29th of May, 1878.

Argument.

*Aston*, Q.C., and *Rigby*, for the Appellants, referred to Order XXXVI., rr. 3, 26; Order XXXVII., r. 1: *Bordier v. Burrell* (3); *Sugg v. Silber* (4).

*Glasse*, Q.C., and *Henderson*, for the Plaintiffs, were not called on.

(1) 5 Ch. D. 235.

(3) 5 Ch. D. 512.

(2) 4 Ch. D. 631.

(4) 1 Q. B. D. 362.

JESSEL, M.R. :—

This case appears to me to be clearly within Order xxxvi., rule 26. That rule provides that the Court or Judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the Act could without any consent of parties be tried without a jury. Therefore the Court has the power to accede to the application of the Plaintiffs, if it thinks desirable to do so. That application has been made under these circumstances. The parties agreed to take the evidence by affidavit, and after two years and a half, during which time they had obtained an immense mass of affidavits, extending to 200 printed pages, the Defendants apply for trial by jury. The Court says, "You cannot try such a case in this way before a jury. The system of trial is not adapted for a cause where the evidence has to be taken by affidavit." That being so, I do not see how the Court of Appeal can say that the Vice-Chancellor has exercised his discretion improperly. Indeed, as a general rule, I do not think that the Court of Appeal ought to interfere with the decision of the Judge in the exercise of his discretion as to the mode of trial.

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JAMES, L.J. :—

I am of the same opinion. It seems clear to me that we ought not to interfere with the discretion of the Judge as to the mode of trial in this case. If this application had come before me two months and a half, instead of two years and a half, after the agreement had been come to as to the mode of taking the evidence, I might perhaps have acceded to it; but it could have been only on the terms that the Defendants should pay all the costs of taking the affidavits, and all costs, charges, and expenses occasioned thereby.

James, L.J.

BRAMWELL, L.J. :—

I am of the same opinion. Everybody has observed that in an ordinary trial the attention of the jury and the audience, and sometimes of the Judge, flags when documentary evidence is

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being read. Therefore it would be useless, with such a mass of evidence, all by affidavit, to expect a jury to arrive at a satisfactory conclusion.

Solicitor for Plaintiffs: *C. W. Yielding.*

Solicitors for Defendants: *Milne, Riddle, & Mellor.*

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April 3.

### THOMAS v. ELLIS.

*Formâ Pauperis—Court Fees.*

Chief Clerk's certificate ordered to be delivered out without payment of Court fees, the Plaintiff since it was ready having obtained an order to sue *in formâ pauperis*.

A DECREE directing accounts was made in December, 1876. The certificate was ready to be delivered out in February, 1878. On the 6th of March, 1878, the official solicitor applied to the Plaintiff's solicitor for payment of £25 for fees of Court on taking the accounts. On the 13th of March an order was made admitting the Plaintiff to prosecute the suit *in formâ pauperis*. He then applied to the Chief Clerk to deliver out the certificate without the Court fees being paid, which the Chief Clerk refused to do, and Vice-Chancellor *Hall* declined to make any order to that effect, for the reason, as was stated, that there had been ample time to take out the certificate before the Plaintiff became a pauper. The application was now renewed to the Court of Appeal.

*Cottrell*, for the Plaintiff, in support of the application.

THE COURT (*Jessel*, M.R., and *Cotton* and *Thesiger*, L.JJ.) made the order.

Solicitors: *Hatton & Westcott.*



*Ex parte* IBBETSON. *In re* MOORE.

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March 16.

*Reputed Ownership—Order and Disposition—Chose in Action—Policy of Assurance—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15, sub-s. 5.*

A policy of life assurance is a "thing in action," and is therefore excepted from the operation of the reputed ownership clause, sect. 15, of the *Bankruptcy Act, 1869*.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

Statement.

On the 20th of August, 1875, an agreement in writing was entered into between *Thomas Moore*, a trader, and *Frederick Ibbetson*, by which it was agreed that, in consideration of a sum of £2819 then owing from *Moore* to *Ibbetson*, and to secure which, with interest, a mortgage bearing even date had been executed by *Moore*, *Moore* should with all convenient speed pay off a sum of money owing to the *London and South Western Bank*, and obtain from the bank two policies of assurance for £500 and £200 respectively, then in the hands of the bank, and would forthwith execute to *Ibbetson* such an assurance of the policies to collaterally secure to him the sum owing to him as aforesaid as he might require. On the 1st of November, 1877, *Moore* filed a liquidation petition, under which, on the 17th of December, a trustee was appointed. When the petition was filed the £2819 still remained due to *Ibbetson*, and the policies were still in the hands of the bank, their debt being still unpaid. No notice of the agreement of the 20th of August, 1875, was given to the bank until the 31st of December, 1877, and no notice of it was given to the insurance company until the 6th of March, 1878. *Ibbetson* applied to the Court of Bankruptcy for an order declaring that, subject to the amount due to the bank, he was entitled to the policies as against the trustee. The Registrar refused the application, on the ground that the policies were at the commencement of the liquidation in *Moore's* order and disposition. *Ibbetson* appealed.

*Roxburgh*, Q.C., and *Oswald*, for the Appellant:—

Argument.

A policy of assurance is clearly a "thing in action," and it is

C. A. therefore expressly excepted from the reputed ownership clause:  
1878 *Bankruptcy Act*, 1869, s. 15, sub-s. 5 (1).

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[They were stopped by the Court.]

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Argument.

*De Gex*, Q.C., and *G. Cary*, for the trustee:—

It has never yet been decided that a policy of assurance is a thing in action. In *Ex parte Union Bank of Manchester* (2), the Chief Judge decided that shares in a joint stock company are not “things in action” within sect. 15, sub-sect. 5.

[JESSEL, M.R.:—I can conceive that some shares might be *choses in action*, while others might not be.]

At any rate, that decision justifies the trustee in the course which he has taken. Moreover, the trustee has the better title, because he gave notice to the insurance company before the Appellant did.

[JESSEL, M.R.:—Has an assignee in bankruptcy ever been allowed to get rid of a valid mortgage by giving notice to the trustee or debtor first?]

By the *Policies of Assurance Act*, 1867 (30 & 31 Vict. c. 144), s. 3, the priority of assignments of policies is regulated by the date of notice to the company. The Appellant ought to have been more prompt in asserting his claim.

[JAMES, L.J.:—He could do nothing till the bank were paid off, and, moreover, you represent the liquidating debtor.]

Judgment,  
Jessel, M.R.

JESSEL, M.R.:—

The simple question which we have to decide is whether a second mortgagee of a policy of life assurance has lost his right by reason of sect. 15 of the *Bankruptcy Act*. In my opinion it is clear beyond all argument that a policy of assurance is a “thing in action,” and is therefore within the exception contained in sub-sect. 5. The Appellant ought to have succeeded before the Registrar, and he must succeed now. The Registrar’s order will

(1) Sect. 15, sub-sect. 5, provides that “things in action, other than debts due to him” (the bankrupt) “in the course of his trade or business,

shall not be deemed goods or chattels within the meaning of this clause.”

(2) Law Rep. 12 Eq. 354.

be discharged, with costs in both Courts, and there must be a declaration that the Appellant is entitled to the policies, subject to the rights of the bank.

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IBBETSON.*In re*  
MOORE.

JAMES and BRAMWELL, L.JJ., concurred.

Solicitor for Appellant: *N. Jourdain.*

Solicitors for Trustee: *G. Mayor Cooke & Dames.*

### ELIAS v. GRIFFITH.

[1873 E. 42.]

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V.-C. H.

May 7, 8, 9, 10,  
12, 14;  
June 19.

*Waste—Lessee—Mine—Slate Quarry opened by the Lessor—Acquiescence—  
Intermediate Assignee of Term.*

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April 2, 8, 9;  
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To enable a termor to work mines it must be shewn that the reversioner had commenced the working of the mines with a view to making a profit; and there is no difference in this respect between a mine and a quarry.

In 1802 the owner of land demised it to a mortgagee for 500 years at a peppercorn rent. In 1811 the mortgagor granted a lease for twenty-one years to a third party of the mines and quarries under the land. Before that date a slate quarry had been opened and worked by the mortgagor on the property; and after that date, but at what time was uncertain, a second quarry was opened and was worked till the commencement of the suit. In 1820 the mortgagee foreclosed the equity of redemption in the term of 500 years, and took possession of the property. In 1873 the Plaintiff, the reversioner on the term of 500 years, filed a bill to restrain the termor from working the slate quarries during the term, and for an account of profits:—

*Held*, by *Hall*, V.C., and by the Court of Appeal, that if the quarries had been opened by the termor without the authority of the reversioner, the Plaintiff would have been entitled to the relief prayed, notwithstanding the lapse of time:

But *Held*, by the Court of Appeal (reversing the decision of the Vice-Chancellor), that the result of the evidence was that both the quarries had been opened by the authority of the reversioner, and that the termor was, therefore, entitled to continue to work them for the remainder of the term.

An intermediate assignee of the term, who had not worked the quarries himself, but had received royalties under sub-leases granted before he came into possession, and had parted with his interest before the commencement of the suit, was *held* not to be liable to account either for the profits made, or for the royalties paid to him during his possession of the term.

*W. E. Hall, L.J. as 450.*  
THE bill in this suit was filed by *Owen E. W. Elias* and others against *W. M. Griffith* and the *Snowdon Slate Quarries Company*,

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to restrain the Defendants from working certain slate quarries on a farm called *Ffriddison* or *Ffriddisa*, in the parish of *Beddgelert* in *North Wales*. The facts were as follows:—

By an indenture dated the 13th of January, 1802, *Robert Bulkely Owen*, who was seised in fee simple of the farm in question, demised the same to *Morris Griffith*, his executors, administrators, and assigns, for a term of 500 years at a peppercorn rent, by way of mortgage for securing the repayment of £400 and interest. No power was given by the deed to commit waste, or to open or work mines or quarries in the premises demised.

By another indenture, dated the 26th of September, 1810, the mortgagor charged the mortgaged premises with the payment of a further sum of £600.

In the year 1816 *Griffith* brought a suit to foreclose the equity of redemption, and obtained a decree to that effect, which was made absolute in August, 1820. Pending the foreclosure suit, he obtained possession of the premises by an action of ejectment. *Morris Griffith* died in 1835, having by his will devised the *Ffriddison* farm to his wife and *David Griffith* as joint tenants. Mrs. *Griffith* having survived *David Griffith*, devised the property to her son *John Griffith*, who died in 1866, having by his will devised the property to his son, the Defendant, *William Morris Griffith*.

There were two slate quarries on the farm, called in the argument the Upper and Lower Quarries. It was satisfactorily proved that the mortgagor before the date of the mortgage dug and sold slate from the lower quarry; that he granted a lease of it in 1808; and also that in September, 1811, a lease for twenty-one years was granted by the mortgagor of the mines and slate under the whole property; but there was a conflict of evidence at what time the upper quarry was first opened. The effect of the evidence is stated in the judgments of the Vice-Chancellor and the Court of Appeal.

*John Griffith* granted certain take-notes and leases for working the slate quarries on the farm; and on the Defendant *W. M. Griffith* coming into possession of the farm certain of the quarrying leases had become vested in the Defendants, the *Snowdon Slate Quarries Company*, for the terms granted by such leases. The



Defendant *W. M. Griffith* never himself worked the quarries, but had received in respect of rent or royalties reserved by such leases sums amounting to about £20.

By an indenture dated the 30th of April, 1873, the Defendant *W. M. Griffith*, in consideration of £5000, conveyed all his interest in the farm to the Defendants the *Snowdon Slate Quarries Company*, their successors and assigns.

The Plaintiffs were the owners of the reversion of the farm and quarries on the determination of the term of 500 years, and by their bill they prayed for an injunction restraining the Defendants from taking slates or other minerals from the premises, and for an account of profits made by the company, and of royalties received by *Griffith*. It appeared that they did not become acquainted with their title to the reversion till December, 1872, when *Griffith* applied to them to release their right to him.

The *Snowdon Slate Quarries Company* was soon afterwards wound up, and the farm and quarries were sold by the liquidator on the 20th of May, 1875, after the filing of the original bill in the suit, and were bought by the *West Snowdon Slate Company*, notwithstanding the protest of the Plaintiffs' solicitor, who attended the sale and furnished the auctioneer with a copy of the bill. The *West Snowdon Slate Company* were then added as Defendants.

The Defendant *Griffith* by his answer disclaimed all interest in the property. He denied that he had himself cut any of the slate, and stated that the money which he had received from the royalties did not exceed £20, and that was received more than six years before the bill was filed.

The cause came on for hearing before Vice-Chancellor *Hall* on the 7th of May, 1877.

Numerous witnesses were examined in Court before the Vice-Chancellor.

*Morgan*, Q.C., *North*, Q.C., and *Rolland*, for the Plaintiffs. They cited *Bishop of London v. Web* (1); *Attorney-General v. Eastlake* (2); *Lord Courtown v. Ward* (3); *Bacon's Abr.* (4); *Gayford*

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(1) 1 P. Wms. 527.

(2) 11 Hare, 205.

(3) 1 Sch. & Lef. 8.

(4) Waste, C. 3.

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v. *Moffatt* (1); *Adair v. Shaftoe* (2); *Purcell v. Nash* (3); *Thornycroft v. Crockett* (4); *Hughes v. Williams* (5); *Rochdale Canal Company v. King* (6); *Goodson v. Richardson* (7).

*Dickinson*, Q.C., *McIntyre*, Q.C., and *Bradford*, for the *Snowdon Slate Quarries Company*, contended that the evidence shewed that the upper quarry, as well as the lower, was opened by or with the authority of the mortgagor; that the same rule applied to a slate quarry as to a mine, and that a lessee was entitled to continue to work an open quarry; that the Plaintiffs had acquiesced in the working of the quarries by the mortgagees and those who claimed under them, and had allowed them to spend large sums of money in working them; and that they had been guilty of laches in not asserting their rights sooner. They cited *Viner v. Vaughan* (8); *Mansfield v. Crawford* (9).

*Eddis*, Q.C., and *Solomon*, for the *West Snowdon Slate Company*, supported the same arguments. They referred to *Spencer v. Scurr* (10); *Bagot v. Bagot* (11); *Anderson v. Pignet* (12).

*W. Pearson*, Q.C., and *Freeling*, for the Defendant *Griffith*, cited *Powell v. Aiken* (13); *Hood v. Easton* (14); *Jegon v. Vivian* (15); *Knight v. Mosely* (16); *Huntley v. Russell* (17); *Earl Cowley v. Wellesley* (18).

*Morgan*, in reply.

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1877. June 19. HALL, V.C., after shortly stating the title of the Plaintiffs and the Defendants, continued:—

Several defences have been raised to the Plaintiffs' suit. It has been contended that laches and acquiescence are a bar to the suit. To this it is answered, as I think correctly, that because trespasses

(1) Law Rep. 4 Ch. 133.

(2) Cited 19 Ves. 156.

(3) 1 Jones, Ir. Ex. 625.

(4) 16 Sim. 445.

(5) 12 Ves. 493.

(6) 2 Sim. (N.S.) 78, 86.

(7) Law Rep. 9 Ch. 221.

(8) 2 Beav. 466.

(9) 9 Ir. Eq. 271.

(10) 31 Beav. 334.

(11) 32 Beav. 509.

(12) Law Rep. 8 Ch. 180.

(13) 4 K. & J. 343.

(14) 2 Jur. (N.S.) 729.

(15) Law Rep. 6 Ch. 742.

(16) Amb. 176.

(17) 13 Q. B. 572.

(18) Law Rep. 1 Eq. 656.

have been committed by a termor by the abstraction of minerals from the demised property, such trespasses do not create a right to commit further trespasses of the same character. As to this I refer to the cases of the *Attorney-General v. Eastlake* (1) and *Lord Courtown v. Ward* (2). No case has been made out entitling the Defendants to require the Court to refuse relief on the ground of the reversioner having so encouraged the acts of the lessees as by reason thereof to entitle the Defendants to ask the Court to refuse the Plaintiffs relief. The counsel for the Defendant *Griffith* contended that the Court would refuse to assist the Plaintiffs because, as he said, it would be against public policy to prevent the working of the slate for a term of 400 years and upwards, the remainder of the 500 years term, which would be the effect of an injunction. There is no authority for such a contention, or principle upon which it can be sustained. Such contention involves this anomaly, that all demises for terms exceeding some period to be laid down by the Court in each case, or for all cases, are to be deemed demises without impeachment of waste. A termor and reversioner can at any time concur in an arrangement for working the slate. It was said that the Plaintiffs' estate being to fall into possession after so long a time, was not worthy of regard by the Court, but its being a valuable interest is plain when it is considered that it enables the Plaintiffs, if they are in other respects right, to prevent the Defendants getting the slate; such a power is valuable as necessitating the purchase of the right of prohibition. Such an interest has been frequently recognised. I need only refer to the observations of Lord *Cranworth* in the *Rochdale Canal Company v. King* (3) and of Lord *Selborne* in *Goodson v. Richardson* (4).

[His Lordship then referred to an objection to the Plaintiffs' title arising out of the deed of 1817, and continued:—]

For the Defendant *Griffith* and the *Snowdon Slate Quarries Company* it is contended that inasmuch as they have parted with all their interests in the property, an injunction against them cannot be granted, the rule of the Court being said to be, No account, no injunction. But that rule has been held to be inapplicable to

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(1) 11 Hare, 205.

(2) 1 Sch. & Lef. 8.

(3) 2 Sim. (N.S.) 78.

(4) Law Rep. 9 Ch. 221.

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the case of a mine: *Parrott v. Palmer* (1); and the case there cited. And as regards the *Snowdon Slate Quarries Company*, their alienation has been *pendente lite*.

The Plaintiffs have endeavoured to shew that the case of slate is different from the case of coal and other minerals, and that a termor of property containing slate cannot get such slate without committing waste, although there was an open quarry when the term was created. If this be the law it would render it unnecessary for me to determine whether the Defendants' contention as to there being open quarries is or is not well founded. But I am of opinion that such is not the law. In *Bacon's Abridgment* (2) the law is stated to be otherwise, and to the same effect are the *Year Book* (3), *Rolle's Abridgment* (4), *Moyle v. Mayle* (5), *Coke upon Littleton* (6), and *White v. Walsh* (7).

The Master of the Rolls in *Ireland*, in *Mansfield v. Crawford* (8), referred to the judgment of Chief Baron *Joy* in *Purcell v. Nash* (9), as stating that mines and quarries were not analogous as regards waste, but it appears to me that the Master of the Rolls misunderstood the observations of Chief Baron *Joy* which had, I consider, reference to there being in the case before him a reservation of royalties, which he considered included the quarry, and that this is so, appears to me to be confirmed by what was said by Lord *St. Leonards* in *Coppinger v. Gubbins* (10). Rightly understood, the judgment of Chief Baron *Joy* is, I think, an authority that a limestone quarry, which cannot, I think, be distinguished from a slate quarry, is subject to the same law as regards waste as a mine, that is to say, that it can be worked by a lessee if open when the lease is granted.

This brings me to the consideration of the questions—first, Whether the quarries in respect of which the Plaintiffs seek relief were or were not open when the deed of 1802 was executed; secondly, If not, whether they were open when the mortgagee entered into possession, that is, whether they were opened by the mortgagor or his lessees whilst he remained mortgagor in posses-

- (1) 3 My. & K. 682.
- (2) Waste, C. 3.
- (3) 9 H. 6, 66 B.
- (4) Vol. ii. p. 816.
- (5) Owen, 66.

- (6) 53 b.
- (7) 1 Jones, Ir. Ex. 626, n.
- (8) 9 Ir. Eq. 271.
- (9) 2 Jones, Ir. Eq. 116.
- (10) 3 J. & Lat. 397.



- sion; thirdly, If the first of these questions be answered in the negative, and the second in the affirmative, whether such opening would entitle the termor to get the slate.

The first and second questions are questions of fact, and I answer the first in the negative. The second I answer by finding that the mortgagor or his lessees did, while he remained mortgagor in possession, open a quarry on that part of the mortgaged property which is to the west of the narrow strip marked No. 9 on the plan of the *Ffriddissa* estate, and which quarry was called in the argument the lower quarry, and that neither the mortgagor nor his lessees, while he remained in possession, opened a quarry elsewhere on the mortgaged property.

[His Lordship then referred to the evidence on which he based his conclusion as to the first and second questions, and continued:—] As to the third question, which is one of law, I am of opinion that the termor became dispunishable for waste as to the lower quarry, by reason of the mortgagor or his lessees having opened that quarry. I consider that the mortgagor using the property, by opening a quarry, must be taken to have done so as well with reference to the future enjoyment of it by his mortgagee as by himself.

Having found as above upon the questions of fact, and determined the questions of law, how does the case stand? As to the Defendant *Griffith*, it has been contended that he is not liable to account. It appears that his predecessor in title, that is, the prior owner of the 500 years term, granted to certain persons licenses to get slate, such licenses being for terms of years, which became vested in the Defendants, the *Snowdon Slate Quarries Company, Limited*, that his title to the term began on his father's death, on the 21st of December, 1866, that he has received some sum for royalties, payable under the licenses so granted, and that he conveyed the property to the *Snowdon Slate Quarries Company, Limited*, by a conveyance dated the 30th of April, 1873. By this conveyance *Griffith* was unable to convey in fee. Its operation was to convey the residue of the 500 years term. It was contended that the licenses, though having regard to my findings valid as to part only of the property, were binding upon *Griffith*, and therefore that he is not liable to account. But it appears to me that

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the receipt by *Griffith* of royalties for slate improperly gotten—and it has not been contended that his receipts were in respect only of royalties for slate gotten from the lower quarry—makes him accountable for the profits equally with the *Snowdon Slate Quarries Company, Limited*. As to this I refer to what was said by Vice-Chancellor *Wood* in *Powell v. Aiken* (1). In that case it was sought to charge mortgagees with moneys received by their mortgagors, and paid over by them to the mortgagees, such moneys being proceeds of coal improperly gotten by the mortgagors from an adjoining colliery. The Vice-Chancellor held that the mortgagees could not be charged, they not having known that the moneys had so arisen, but he said had they known it they would have been accountable, as they would have been parties to the abstraction. In that case reference was made to the case of *Doe v. Harlow* (2), in which it was laid down that a party receiving rent from a wrong-doer was accountable for rents and profits to the rightful owner. In *Doe v. Harlow* the party in possession had been let into possession by the party held liable. Here *Griffith's* predecessor in title granted the licenses, but this appears to me unimportant. *Griffith* adopted the transaction by receipt of the royalties, and thus, as Vice-Chancellor *Wood* said, became an actor in the wrongful abstraction. On this point I may also refer to the judgment of the Vice-Chancellor *Stuart* in *Hood v. Easton* (3). There was an appeal from the decision in that case (4), and there was a compromise, but apparently the ground of compromise had reference to a matter independent of the Vice-Chancellor's views of the case in reference to the purpose for which I have referred to it. *Griffith's* accounting must be limited to the time when he conveyed to the *Snowdon Slate Quarries Company, Limited*, and to six years from the filing of the original bill.

As to the *Snowdon Slate Quarries Company, Limited*, they in the year 1875 conveyed the property to the *West Snowdon Slate Company, Limited*. The accounting of the *Snowdon Slate Quarries Company, Limited*, must be limited to the time preceding the date of the conveyance to the *West Snowdon Slate Company*, and must be limited, as I have mentioned, to the six years before the date of the filing of the bill. As to the *West Snowdon Slate Com-*

(1) 4 K. & J. 349.

(2) 12 A. & E. 40.

(3) 2 Jur. (N.S.) 729.

(4) Ibid. 917

*pany*, their accounting must date only from the time of the conveyance to them. As regards *Griffith*, he being accountable as above mentioned, he ought not to be charged with the royalties he received. The Plaintiff's claim of royalties in his statement of claim should not, I think, be treated as an adoption of the licenses to work. The account will of course be confined to the working in the upper quarry, and must be taken in the milder mode of accounting in respect of mineral abstracted, as in *Jegon v. Vivian* (1); that is, the accounting party will be allowed the cost of hewing. I think this proper, because as regards the *Snowdon Slate Quarries Company*, they, at all events until they became aware that their lessor was only a termor, worked under a *bonâ fide* belief that they were entitled to do so. And as regards all the parties, there has been a substantial controversy as to there having been a quarry opened on each of the two portions at times entitling the termor and those claiming under him to get slate in each of such portions. The Plaintiffs having only succeeded as to one portion of the estate, there will not be any costs up to and including the present time. The injunction must be framed in accordance with what I have stated as to the working.

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From this judgment the Defendants appealed. The appeal came on to be heard on the 2nd of April, 1878.

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*Dickinson*, Q.C., and *Bradford*, for the *Snowdon Slate Quarries Company* :—

Argument.

The evidence is conclusive that the lower quarry was opened by the mortgagor, and consequently the mortgagee and those claiming under him had a right to continue working it. There is no difference in this respect between a quarry and a mine of coals or other minerals. The only real question is about the upper quarry. If the evidence is doubtful at what exact time it was opened, it has been at all events worked for a long series of years by persons lawfully in possession of the surface, and the Court will presume that the origin of the enjoyment was lawful : *Leconfield v. Lonsdale* (2) ; *Seaman v. Vawdrey* (3). We have been in undisturbed

(1) Law Rep. 6 Ch. 742.

(2) Law Rep. 5 C. P. 657.

(3) 16 Ves. 390.

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enjoyment of the property under a title derived through three wills and a deed of purchase, and the Court will not now disturb our possession. The Plaintiffs had as good opportunities of knowing the facts as we had, and have been guilty of laches in not sooner asserting their rights, if they have any: *Bulley v. Bulley* (1); *Parrott v. Palmer* (2). Through their acquiescence we have incurred great expense in working the quarries.

*Horne Payne*, and *Turner*, for the *West Snowdon Slate Company*.

*W. Pearson*, Q.C., and *Freeling*, for the Defendant *Griffith*:—

Whatever relief the Plaintiffs may be entitled to against the other Defendants, they have none against *Griffith*. He never worked the quarries or granted any leases for working them. He only received the royalties under leases granted by his predecessors, amounting altogether to about £20. Moreover, in 1873 he parted with all his interest, and on the original bill being filed he at once disclaimed all interest.

*Osborne Morgan*, Q.C., and *North*, Q.C. (*Rolland* with them), for the Plaintiffs:—

The defence of laches and acquiescence is not applicable as between lessor and lessee, even where the lessee has had no notice and has been at great expense. No length of time can convert waste into a lawful act: *Lord Courtown v. Ward* (3); *Attorney-General v. Eastlake* (4); *Adair v. Shaftoe* (5); *Gayford v. Moffatt* (6); *Robson v. Flight* (7); *Clements v. Welles* (8); *Finch v. Shaw* (9); *Phillips v. Phillips* (10); *Pickett v. Packham* (11). Admitting that a lessee is entitled to work a mine which the lessor has opened, it does not follow that he is entitled in like manner to work out of a quarry. In the latter case the surface is taken away:

(1) Law Rep. 9 Ch. 739.

(2) 3 My. & K. 632.

(3) 1 Sch. & Lef. 8.

(4) 11 Hare, 205.

(5) Cited 19 Ves. 156.

(6) Law Rep. 4 Ch. 133.

(7) 34 Beav. 110; 4 D. J. & S. 608.

(8) Law Rep. 1 Eq. 200.

(9) 19 Beav. 500.

(10) 4 D. F. & J. 208.

(11) Law Rep. 4 Ch. 190.



*Purcell v. Nash* (1); *Mansfield v. Crawford* (2); *Coppinger v. Gubbins* (3).

With respect to *Griffith*, when the original bill was filed we knew of no one else who was interested in the term. We do not ask to follow the royalties into his pocket, but we say that he has made himself a party to the trespass, and is liable to the consequences. If he did not grant any of the leases to those who worked the quarries, he confirmed them by receiving rent under them: *Doe v. Harlow* (4); *Powell v. Aiken* (5).

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*Dickinson*, in reply.

May 4. COTTON, L.J., read the judgment of the Court (*James*, Judgment, C. A. Cotton, and *Thesiger*, L.JJ.), as follows:—

In this case the Plaintiffs filed their bill as owners subject to a mortgage term of 500 years of certain mountain land in *Wales*, to restrain the working of the slate on that property by the Defendants, and for an account. There are two quarries on the property, one called the lower quarry, the other, which is said to be at a distance of two miles from the lower, and much higher up the slopes of *Snowdon*, called the upper quarry. The Vice-Chancellor found, as a fact, that the lower quarry was worked by the owner of the equity of redemption, or by his lessees, before the mortgagee took possession, and granted neither injunction nor account in respect of this quarry, and from this the Plaintiffs have not appealed. But he found, as a fact, that neither the mortgagor nor his lessees while he remained in possession opened the upper quarry, and in respect of this quarry he granted an injunction and account. Against this judgment all the Defendants have appealed. The case of the two companies in the view which we take is substantially the same. The Defendant *Griffith* stands in a different position.

We will deal first with the question of law raised by the Plaintiffs, namely, that although a termor may lawfully work during his term mines which have been opened by the freeholder before the

(1) 1 Jones, Ir. Ex. 625; 2 Jones, Ir. Ex. 116.

(2) 9 Ir. Eq. 271.

(3) 3 J. & Lat. 397.

(4) 12 A. & E. 40.

(5) 4 K. & J. 343.

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commencement of the tenant's interest, there is such a difference between an open mine and an open quarry that although a termor may lawfully work a mine opened by the freeholder before he acquires possession he cannot work a quarry so opened. In our opinion there is no such distinction. To enable a termor or tenant for life punishable for waste to work mines, it must be shewn that the owner of the inheritance, or those acting by his authority, have commenced the working of the mines with a view to making a profit from the working and sale of what is part of the inheritance. When this is established, though no profit has in fact been made, the mine is open in such a sense as to justify the continuance of the working by a termor. When it is established that a quarry has been worked by, or by the authority of, the owners of the inheritance, for the purpose of making a profit by digging, or otherwise raising and selling part of the inheritance, the same principle applies. There is however this difference between a mine and a quarry, namely, that stone or slate is frequently dug for the purpose of building or repairing houses on the property and not for the purpose of profit, and although this is in one sense an opening of a quarry, it is not so in the sense necessary to enable a termor to continue the working. It is not an opening for the purpose of profit. It is not a devotion of the land to the purpose of making profit by the raising and sale of a portion of the inheritance. The case of *Purcell v. Nash* (1), a decision of the Court of Exchequer in *Ireland*, was referred to by Mr. *Morgan* in support of the proposition above referred to. But in *Coppinger v. Gubbins* (2) Lord *St. Leonards* treated that case as depending on the reservation of royalties contained in the lease. We cannot treat that case as an authority for the proposition of law for which the Plaintiffs contend.

Ought we to hold that the upper quarry was so opened as to entitle the termor to work it? The term was created in the year 1802, and the termor foreclosed the equity of redemption in 1820, and entered into possession in or shortly before that year. In the year 1808 a lease had been granted of one quarry, in the lease stated to be then open, and which, we think, must be presumed to have been the lower quarry; and in September, 1811, a lease for

(1) 1 Jones, Ir. Ex. 625; 2 Jones, Ir. Ex. 116. (2) 3 J. & Lat. 397, 411.

twenty-one years was granted of the mines and slate rock in the entire property. This appears from an abstract made in the year 1815 by the solicitor of the then owner of the reversion, who was then trying to sell. There is evidence that this lease was considered but of little value, but there is no evidence that it was ever surrendered or forfeited. At some period between the years 1830 and 1832 a take-note of the slates under the whole estate was granted. It was urged, on the part of the Plaintiffs, that this take-note was evidence that at its date no quarry was open in the upper part of the property. But, in our opinion, there is no ground for this contention. The take-note is a license to explore and work for a limited time, with an option during that time to take a lease. It shews that the licensees were not in their then knowledge of the property willing to bind themselves by a lease, but nothing more. In the year 1847 a lease was granted of the upper quarry, and it is conceded that from shortly after the date of this lease the upper quarry had been constantly worked. [His Lordship then referred shortly to the evidence as to the working of the upper quarry, and continued:—]

Under these circumstances, we are of opinion that the original working at the site of the upper quarry ought to be presumed, under the authority of the lease of 1811, to have been lawful instead of unlawful, and that consequently as the lease was clearly granted for the purpose of enabling the slate to be raised and sold for the purpose of profit, the upper quarry must be considered as one opened by the authority of the owner of the inheritance, so as to enable the termor to work it. The now undisputed fact that the lower quarry was so opened renders the presumption to the same effect as regards the upper quarry derived from the evidence to which we have referred, stronger than if the estate had been, but for the upper quarry, admittedly unopened.

In arriving at this conclusion we differ from the Vice-Chancellor who, as was very properly urged upon us, heard and saw the witnesses. If the question from our point of view had been one depending mainly, or to any considerable extent, upon the credibility of the witnesses, we should not have felt justified in reversing the finding of the Vice-Chancellor, but this is not the case. The difference between the Court and the Vice-Chancellor

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v.

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Judgment, C. A.

C. A. is as to the effect which, having regard to the existence of the  
1878 lease of 1811, ought to be given to the facts proved.

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—  
Judgment, C. A.  
—

This disposes of the case against all the Defendants. But, although it is not necessary for the decision of the case, we think it right not to pass in silence the decree which has been made against the Defendant *Griffith*. He succeeded to the property after the grant of the lease under which the *Snowdon Slate Quarries Company*, previously to the filing of the bill, worked the slate, and though he received the rent payable by them he never himself worked any slate, or directed the working thereof. Moreover, before the filing of the bill he parted with all his interest in the property to the Defendants, the *Snowdon Slate Quarries Company*, and immediately after the bill was filed his solicitor so informed the solicitor of the Plaintiffs. Under these circumstances we think that even if the Plaintiffs had been entitled to a judgment against the Defendants, the two companies, they were not entitled to either injunction or account against the Defendant *Griffith*.

The judgment of the Vice-Chancellor must be reversed, and the bill dismissed against all the Defendants with costs.

Solicitor for Plaintiffs: *J. H. Lydall*, agent for *T. & T. Martin*, *Liverpool*.

Solicitors for Defendants: *W. Webb*; *W. A. Crump*.



*In re* PRINTING AND NUMERICAL REGISTERING  
COMPANY.

M. R.

1878

March 23.

*Company*—*Winding-up*—*Execution Creditor*—*Priority*—*Applying Rule in Bankruptcy*—"Secured Creditor"—*Judicature Act*, 1875, s. 10—*Bankruptcy Act*, 1869, s. 87.

The rule in bankruptcy by which (*Bankruptcy Act*, 1869, s. 87) an execution creditor for more than £50 loses the benefit of his execution if the sheriff, within fourteen days after a sale, has notice of bankruptcy, applies, under sect. 10 of the *Judicature Act*, 1875, to a company in liquidation.

*In re Albion Steel and Wire Company* (1) explained.

The solicitors of a company, being its creditors for more than £50, issued a writ of execution against the company, and on the 20th of December, 1875, lodged it with the sheriff, who thereupon took possession. On the 23rd of December a winding-up petition was presented, the company's solicitors being solicitors to the Petitioner, and on the 15th of January, 1876, a winding-up order was made, under which the sheriff withdrew, and the company's property was ordered to be sold by the liquidator, but it was declared that the execution creditors should have the same priority against the proceeds of the property as they would have had if it had been sold by the sheriff.

The property having been sold by the liquidator, but the proceeds being insufficient for payment of the company's debts, the execution creditors applied by summons to have their debt paid in priority to the other creditors.

Summons dismissed with costs.

ADJOURNED SUMMONS.

Messrs. *Newman & Co.*, the solicitors to the *Printing and Numerical Registering Company, Limited*, having obtained a judgment against the company for an unpaid bill of costs amounting to £1083, issued a writ of execution for that amount against the company on the 8th of December, 1875, and on the 20th of December, 1875, lodged it with the sheriff, who thereupon took possession of the company's property. Several other creditors had obtained writs of execution against the company.

On the 23rd of December following a petition was presented for winding up the company, Messrs. *Newman & Co.* being the solicitors to the Petitioner, and a winding-up order was made on the 15th of January, 1876. By that order directions were given that the sheriff should deliver up possession to the liquidator,

(1) 7 Ch. D. 547.

(c) Also in *Re Witherspoon Brick Works* 16 Ch. D. 337 ca

11 Ch. D. 319  
10 Ch. D.  
341-2-6  
11 Ch. D. 670  
670, 680  
-758  
12 Ch. D. 64  
-185  
-823  
16 Ch. D. 339  
340  
-374, 375  
17 Ch. D. 338  
340  
19 Ch. D. 44  
9 Ch. D. 654

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---

that the company's property should be sold, and that the several execution creditors should have the same priority against the proceeds of the property seized by the sheriff when sold, as they would have had if it had been sold by the sheriff.

The sheriff thereupon withdrew, and the property was shortly afterwards sold by the liquidator.

The proceeds of sale in the liquidator's hands being insufficient for payment of the company's debts in full, Messrs. *Newman & Co.* applied by summons that their debt might be paid in priority to the debts of the other creditors of the company.

The question thus raised was whether, under sect. 10 of the *Judicature Act*, 1875 (1), the rule in bankruptcy by which (*Bankruptcy Act*, 1869, s. 87) an execution creditor for more than £50 loses the benefit of his execution if the sheriff, within fourteen days after a sale, has notice of bankruptcy, applies to a company in liquidation.

Argument.  

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*Chitty*, Q.C., and *Whitehorne*, for Messrs. *Newman & Co.*:—

If the words "secured creditors" in sect. 10 of the *Judicature Act*, 1875, include "execution creditors," then no doubt the rule in bankruptcy destroying the priority of such creditors applies; but we submit that the words should be restricted to creditors holding ordinary securities, according to the definition of "secured creditor" in the *Bankruptcy Act*, 1869, s. 16, sub-s. 5, which has reference to security by contract. As your Lordship said in *In re Albion Steel and Wire Company* (2), the section does not mean that the whole of the rules in bankruptcy shall apply to com-

(1) Sect. 10 of the *Judicature Act*, 1875, provides that "in the winding up of any company under the *Companies Acts*, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in

force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends . . . out of the assets of any such company, may come in . . . under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

(2) 7 Ch. D. 547, 550.

panies in liquidation. There is nothing in the section to take away the security which we, as execution creditors of the company, retain by virtue of the winding-up order.

[JESSEL, M.R.:—The rule in bankruptcy applies which destroys the security.]

It has been held by other Judges besides your Lordship that a limited construction should be put upon the section. In *In re Westbourne Grove Drapery Company* (1) Vice-Chancellor Bacon held that “debts and liabilities provable” do not comprise the obligations of a company in liquidation under covenants in a lease to pay rent and not to assign without consent, no breach having taken place. In *In re Coal Consumers Association* (2) Vice-Chancellor Malins held that the section did not give the landlord of property of which a company in liquidation were tenants a right to distrain for rent due before the winding-up order. And in *In re Knott* (3) Vice-Chancellor Hall held that the rules in bankruptcy did not apply so as to render an unfiled bill of sale void as against the unsecured creditors of a testator.

We submit, therefore, that our priority as execution creditors should not be taken away by the application of the bankruptcy rule.

They also mentioned *Ex parte Railway Steel and Plant Company* (4).

*Roxburgh*, Q.C., *W. Barber*, and *Methold*, for execution creditors opposing, were not called upon.

*Davey*, Q.C., and *Romer*, for the liquidator.

JESSEL, M.R.:—

I must say that I myself have a clear opinion as to the mode in which the present application ought to be dealt with, though I confess I had not so clear an opinion upon the case of *In re Albion Steel and Wire Company* (5), which was the last case before me upon the construction of this section of the *Judicature Act*, 1875. What

(1) 5 Ch. D. 248.

(2) 4 Ch. D. 625.

(3) 7 Ch. D. 549, n.

(4) 8 Ch. D. 183.

(5) 7 Ch. D. 547.

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Argument.

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the precise meaning of the section is, I think no one can positively say. In putting a construction on obscure enactments or instruments no single Judge is entitled to say another is wrong; all he can say is that he differs from the other Judge as to the meaning of the obscure enactment or instrument before him.

Now what does the Act say? It says this:—[His Lordship read the portion of the 10th section above referred to, and continued:—]

Therefore, as I read the section, the respective rights of the secured and unsecured creditors of a company in liquidation are the same as under the law of bankruptcy.

The first question, then, I have to consider is, are the creditors in question secured or unsecured? They are certainly secured in a sense, by having taken the property of the company, the debtor, in execution. Under that execution they were entitled to sell the property and pay themselves out of the proceeds: they are secured in that way; they are not secured under contract. Persons holding security, whether under an execution or a garnishee order, or by judgment on tort, or by contract before judicial interposition, are secured creditors.

Then if the applicants in this case are secured creditors, what are their rights? Their rights are to be determined by the law of bankruptcy; and the 87th section of the *Bankruptcy Act*, 1869, provides that where the goods of a trader have been taken in execution on a judgment for a sum exceeding £50 and sold, the sheriff is to retain the proceeds of the sale in his hands for a period of fourteen days, and upon notice being served on him within that period of the presentation of a bankruptcy petition against the trader, he is to hold the proceeds of the sale, after deducting expenses, on trust to pay the same to the trustee; but if no such notice is served on him within the fourteen days, or if, such notice having been served, the trader is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff has notice, he may deal with the proceeds of sale in the same manner as he would have done if he had not been served with notice of the bankruptcy petition. That section therefore defines the rights of an execution creditor in bankruptcy.

Now the 10th section of the *Judicature Act*, 1875, says that in the winding-up of a company "the same rules shall prevail and

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be observed as to the respective rights of secured and unsecured creditors . . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt;” and one of such rules is, as I have shewn, that an execution creditor is not to have the benefit of his execution if within fourteen days after the sale of the debtor’s property the sheriff has notice of bankruptcy. I must therefore apply that rule to the present case, and hold that even if the sheriff had actually sold the property of the company, the execution creditors could have had no right to pay themselves out of the proceeds, but the whole of the proceeds must have been handed over to the liquidator for the general benefit of the creditors.

But it was said that my decision in *In re Albion Steel and Wire Company* (1) was, in effect, a decision the other way. I do not think so; at all events it was not intended by me to be so. If the words “secured creditors” are to include a man who gets a security by virtue of the rules in bankruptcy, as, for instance, under the 32nd section of the *Bankruptcy Act*, then my decision in that case would have been the contrary to what I now decide; but what I meant to say was that a “secured creditor” is a creditor who has a security as against the company itself. In no sense could a man who acquired his security for the first time under the law of bankruptcy be said to be a secured creditor of the bankrupt, because after bankruptcy it is to the property of the bankrupt, and not to the bankrupt himself that he must look. In the case of the *Albion Steel and Wire Company* the creditor never had any security as against the company. I make these observations on that case as I see that view is not there so clearly expressed as it might have been.

The summons will be dismissed, with costs.

Solicitors: *Newman, Stretton, & Hilliard; Piesse & Son; F. Norton.*

(1) 7 Ch. D. 547.

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REGISTERING  
COMPANY.

Judgment.

M. R.

*In re HUTCHINSON AND TENANT.*

1878

May 11.

*Will—Gift to Wife absolutely, with Power of Disposition for Benefit of Family—Precatory Trust—"Full Confidence"—"Family."*

70/1/2/3/4/5  
230  
24/2/2/2/2/3  
207

A testator gave all his property to his wife "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so":—

*Held*, that the wife took absolutely.

*Lambe v. Eames* (1) followed.

A testamentary gift by a married man to his "family" should be read as a gift to his "children" to the exclusion of his wife.

Statement.

*FRANCIS ROE* made his will, dated the 6th of September, 1855, in the following terms. After directing his debts to be paid by his executrix thereafter named, the testator proceeded:—"As to, for, and concerning all my real and personal estates, of whatever nature, kind, or quality, and wheresoever the same may be situate, I give, devise, and bequeath the same to my dear wife, *Hannah Roe*, absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so." And the testator appointed his wife his executrix.

The testator died in 1864. His widow, *Hannah Roe*, by her will, dated the 28th of March, 1877, devised and bequeathed all her real and personal estate to her executors and trustees in trust for sale, and shortly afterwards died.

*Francis Roe* had nine children, eight of whom were now living.

*Hannah Roe's* trustees having contracted to sell a public-house called the *King's Arms* at *Bakewell*, originally forming part of the real estate comprised in *Francis Roe's* will, the purchaser raised the objection that *Hannah Roe* did not take an absolute interest under the latter will, but that the will created an ultimate trust in favour of the testator's children, his widow taking only a life estate, and consequently that the concurrence of the children was necessary.

The point was submitted for the opinion of the Court upon a summons taken out by the vendors, under the *Vendor and Pur-*

*chaser Act*, 1874, to obtain a declaration that they could make a good title under the wills.

*B. B. Rogers*, for the vendors :—

I submit that there is no trust for the testator's children, but that his widow took absolutely: *Lambe v. Eames* (1); *Stead v. Mellor* (2), where your Lordship distinguished *Briggs v. Penny* (3). This is in terms an absolute gift, with a superadded power of disposition, which is however nugatory, and does not detract from the prior absolute gift: *Southouse v. Bate* (4); *Weale v. Ollive* (5).

*Dunning*, for the purchaser :—

This is in effect a gift to the widow for life, with a precatory trust in remainder in favour of the testator's children: *Shovelton v. Shovelton* (6); *Curnick v. Tucker* (7); *Le Marchant v. Le Marchant* (8); taking "family" to mean "children": *Pigg v. Clarke* (9).

[JESSEL, M.R. :—A testamentary gift by a married man to his "family" should be read as a gift to his "children."]

By adopting the vendors' contention you would entirely cut out the clause after the word "absolutely"—a clause which is significant, and to which effect can and should be given.

In *Lambe v. Eames* the words were different, and I ask your Lordship to follow the more recent decisions in *Curnick v. Tucker* and *Le Marchant v. Le Marchant*.

[JESSEL, M.R., mentioned *Mackett v. Mackett* (10).]

JESSEL, M.R. :—

I have to consider a very short will, and to give my opinion upon it. Now, if it had not been for authority, looking at the will, I should have felt no doubt or hesitation in saying what its meaning was. [His Lordship then read the will as above stated, and continued :—] It is alleged on one side and denied on the

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Argument.

Judgment.

(1) Law Rep. 6 Ch. 597.

(2) 5 Ch. D. 225.

(3) 3 Mac. & G. 546.

(4) 16 Beav. 132.

(5) 32 Beav. 421.

(6) 32 Beav. 143.

(7) Law Rep. 17 Eq. 320.

(8) Ibid. 18 Eq. 414.

(9) 3 Ch. D. 672.

(10) Law Rep. 14 Eq. 49.

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Judgment.

other, that these words, "with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," constitute a trust. In my opinion these words, standing by themselves, independently of authority, are not intended to impose any obligation on the widow. They are merely an expression of the testator's wishes and belief, as distinguished from a direction amounting to an obligation. His widow is to have power to give the property to any one she may think fit: she is to be complete owner of the property, but he expects her to dispose of it among his family, that is, his children. There is no occasion to tell her that she is to provide for herself, there being already a prior absolute gift to her. If you make the power override the absolute gift, the wife gets nothing, for you could then only give her an interest by inserting in the power something which is not there, namely, the word "wife." If you do not put in that word, you make her a trustee for the testator's family, that is, his children only; for there is no reported case in which the word "family," when used by a married man, has been held to include his wife as well as his children.

Now that being the position of matters, the question I have really to consider is whether, having come to that conclusion as to the meaning of the instrument, I am compelled by decisions of other Judges to arrive at the opposite conclusion. It appears to me that all the cases are distinguishable. Here is a gift by a testator to his wife absolutely, with something which looks like a superadded power, and there are some authorities in which it has been held that under such a gift the wife takes a life interest only. There is, however, an authority of the Court of Appeal of a strong character against that view. In *Lambe v. Eames* (1) the testator gave his estate to his widow, "to be at her disposal in any way she may think best for the benefit of herself and family;" and the Court of Appeal held, affirming the decision of Vice-Chancellor *Malins*, that the widow took absolutely. I observe that the Vice-Chancellor seems to have laid some stress on the words "for the benefit of herself and family" as shewing the intention to give the widow an absolute interest. But I do not think it was necessary to do that. If you struck out the word "herself," it

(1) Law Rep. 6 Ch. 597.

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would still be clear that the widow was to have some benefit. When the testator says "for the benefit of herself and family," he merely expresses that which would have been implied, though not expressed, because he has already given a benefit to his widow.

I am, therefore, of opinion that the present case is not distinguishable from *Lambe v. Eames* (1), which is an authority entirely in point.

I have been referred to two authorities decided since *Lambe v. Eames*, and apparently in conflict with it, but they are decisions of inferior Courts, and no number of decisions by inferior Courts can overrule a decision of a superior Court. In my opinion the decision of the Court of Appeal in *Lambe v. Eames* covers this case, and I shall therefore follow it.

Both on principle and in consonance with the most modern authorities, I decide that the widow took absolutely, and therefore that the title is good.

Solicitors: *Cree & Son*, agents for *J. Taylor, Bakewell ; Pattison, Wigg, & Co.*, agents for *Broomhead, Wightman, & Moore, Sheffield*.

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HUTCHINSON  
AND TENANT.  
Judgment.

### In re POPLAR AND BLACKWALL FREE SCHOOL.

Practice—Charity School—Charity Trustees—Paying Fund into Court under Trustee Relief Act, without Notice to Charity Commissioners—Irregularity—Charitable Trusts Act, 1853, s. 17—Transfer to School Board—Settling Scheme—Aiding Local Rates.

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1878  
June 1.

Although sect. 17 of the *Charitable Trusts Act*, 1853, does not prohibit charity trustees from paying their trust fund into Court under the *Trustee Relief Act*, and thereby relieving themselves from further liability and putting an end to their trust, it is irregular for them to follow that step up by presenting a petition for the administration of the charity funds. In all cases of doubt or difficulty as to the administration of the fund the trustees should apply to the Charity Commissioners under the *Charitable Trusts Act* before taking any legal proceedings with reference to the fund:

*Semble*, in settling a scheme for the regulation of the funds of a charity

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school on its transfer to a school board, care should be taken to provide that the funds shall be applied for the advancement of learning in the school—as for instance, by establishing exhibitions or scholarships—and not for the general purposes of the school, which would have the effect of a grant in aid of the local rates.

IN the year 1815 the *Poplar and Blackwall Free School* was established for the education of poor children, and a sum of stock was vested in trustees as an endowment fund, its application being regulated by a trust deed.

In 1874 the school was transferred to the *London School Board*, whereupon the trustees, instead of applying to the Charity Commissioners for advice, or for their sanction to the institution of legal proceedings relating to the trust fund, of their own motion paid the fund into Court under the *Trustee Relief Act*. Although the affidavit made on the payment into Court stated that the Attorney-General was interested in the fund as representing the general public, no notice of the payment into Court was served upon him as required by Order v. of the Chancery Funds Amended Orders, 1874.

The trustees then prepared a petition intituled under the *Trustee Relief Act*, and *Sir Samuel Romilly's Act* (52 Geo. 3, c. 101), asking that a scheme might be settled for the application of the fund. The Attorney-General was named as Respondent to the petition, but, upon application being made to him for his consent to it, he refused his fiat, and himself presented a petition intituled under *Sir Samuel Romilly's Act* and the Trustee Acts, asking for the settlement of a proper scheme for the regulation and management of the fund, having regard to the fact that the school had been transferred to the *London School Board*, and for the appointment of new trustees.

The latter petition now came on for hearing.

Argument.

*Vaughan Hawkins*, for the Petitioner, the Attorney-General, consented to the Respondents, the trustees, having their costs of the present petition, but objected to their having the costs of their own petition, they having chosen to take the irregular course of paying the fund into Court without first obtaining the consent of the Charity Commissioners under sect. 17 of the *Charitable Trusts*

*Act*, 1853, and giving notice to the Attorney-General under Order v. of the Chancery Funds Amended Orders, 1874.

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Argument.

*E. Beaumont*, for the trustees:—

The Act only requires the consent of the Commissioners to any proceeding for “obtaining relief.” Paying money into Court is not “obtaining relief.” I submit we are entitled to the costs of our petition, as we acted *bonâ fide*.

*Hawkins*, in reply:—

Charity funds cannot be administered without the consent of the Commissioners, and therefore paying a charity fund into Court without their consent is an attempt to oust their authority. Paying money in is a proceeding with a view to obtaining relief, and is therefore within the section. The proceedings of the trustees have been irregular from the commencement, and have led to unnecessary expense.

I would suggest to your Lordship that in settling a scheme provision might be made for applying the fund, or part of it, towards establishing exhibitions or scholarships in the school.

[JESSEL, M.R.:—A difficulty does sometimes occur in cases where an existing charity school is transferred to a School Board, and a new scheme has to be prepared for the regulation of the charity fund. Application of the fund to the general purposes of the school is objectionable, because that is really a grant in aid of rates, and not strictly for the benefit of the school. I think the fund should be applied somewhat in the mode suggested, that is, for the advancement of learning in the school.]

That is what we desire.

JESSEL, M.R.:—

Judgment.

The question raised by this petition is one of considerable importance. It appears that this charity school was handed over to the *London* School Board, and as it therefore became impossible to apply the fund according to the directions of the original trust deed, a new scheme was wanted. The proper course for the trustees to take was to apply to the Charity Commissioners for a

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new scheme, which the Commissioners would have prepared at a merely nominal expense, probably retaining these gentlemen in their position of trustees. However, instead of adopting this course, they elected to pay the fund into Court under the *Trustee Relief Act*, and did not proceed simply under *Sir Samuel Romilly's Act*, because the consent of the Charity Commissioners had not been obtained to the proceedings. I must, therefore, consider the proceedings as taken simply under the *Trustee Relief Act*.

Now, were the trustees justified in proceeding under that Act? On looking at the words of the 17th section of the *Charitable Trusts Act*, 1853, prohibiting proceedings to be taken by charity trustees without notice to the Commissioners, except in the case of applications in a suit or matter actually pending, I find nothing which prohibits charity trustees from paying their trust fund into Court under the *Trustee Relief Act*, if they choose. The only effect of their doing so is to relieve themselves from liability and to put an end to their trust. These trustees, therefore, had a strict right to pay the money into Court under the *Trustee Relief Act*, and the result of their doing so was to relieve them from the duty of administering the trust through their ceasing to be trustees. That is the meaning and effect of paying the money into Court.

But the trustees seem to have imagined that, having thus discharged themselves from the office of trustees, they still remained trustees for charitable purposes. It is true that in every case where trustees pay in money, the Court orders them to be served with any petition relating to the trust fund, not because they are trustees, but because they are the persons who possess the most knowledge of the particulars of the trust, and can therefore give the Court information respecting it.

Acting, then, under the mistaken assumption that they were still trustees of the fund, these gentlemen, instead of simply serving the Attorney-General, under the Chancery Funds Orders, with notice of the payment into Court, and leaving him to take the necessary steps for the administration of the fund, set about administering the fund themselves by presenting a petition to the Court for a scheme, making the Attorney-General a Respondent to the petition. When, however, the matter came before the Attorney-General, he declined to issue his fiat, or to recognise the proceed-



ings of the trustees, and he himself now presents a petition for the settlement of a scheme, and objects to the trustees being allowed the costs of their petition, on the ground that it was wholly irregular and unnecessary.

Under the circumstances, I shall make an order on the present petition directing the settlement of a scheme, and staying further proceedings against the trustees. They shall have their costs of this petition, but I shall not allow them their costs of preparing the abortive petition.

Solicitors: *Clabon ; F. Oxley.*

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V.-C. M.

GILBERT v. SMITH.

1878

[1876 G. 18.]

May 20, 21.

*Partition Act (31 & 32 Vict. c. 40), ss. 3, 4, 5—Some Parties desiring a Sale—  
Offer by others to purchase.*

*1162 P. 78.*  
In a partition suit the Plaintiffs, who were entitled to three-sixteenths of the property, desired a sale by auction, alleging that by no other means could the value of this particular property be ascertained. The Defendants, who were entitled to the remaining thirteen-sixteenths, objected to a sale, and offered to purchase the three-sixteenths:—

*Held*, that the case came within the 5th section of the *Partition Act*, 1868, although it satisfied the conditions of the 3rd section, and upon some of the Defendants undertaking to purchase, a valuation was directed to be made in Chambers, and sale and purchase accordingly.

*Drinkwater v. Ratcliffe (1) discussed.*

Statement.

*Reverend Messrs 1162 P. 78 C.R. 10*  
THIS was a partition suit, in which at the original hearing the usual reference was made to Chambers to ascertain the interests of the various parties in the property sought to be partitioned. The result of the inquiries in Chambers was to this effect—that the Chief Clerk had divided the shares into 336 parts, of which the Plaintiffs *Thomas W. Jones* and *George Biron*, as trustees of a settlement dated in January, 1871, and the Plaintiff *George Heaton* as mortgagee, were entitled to forty-two parts, *William Pitt* to fifty-nine parts, *William Pitt*, and *Peter Pitt* as his mortgagee, to twenty-five parts, the said *Peter Pitt* to thirty-five parts, *Peter Pitt* and *Joseph Ballard Pitt*, as trustees of a settlement dated in July, 1868, to thirty-five parts, *Joseph B. Pitt* to fifty-six parts, the Defendants *Mary Smith* and *Thomas Drinkworth* to sixty-three parts, and *Henry Sutor* and *Emma* his wife to the remaining twenty-one parts.

It was admitted by both sides that practically the shares might be divided into sixteenths, and that the Plaintiffs and others in the same interest were entitled among them to three-sixteenths, while the Defendants were entitled to thirteen-sixteenths of the entirety. The property was situate in the centre of the town of *Birmingham*, where improvements were going on which it was

(1) Law Rep. 20 Eq. 528.

*(1) Reversal affirmed by H.L. on Pitt-Jones  
55 p. 651.*

alleged would greatly increase the value of the property. The Plaintiffs, being the owners of three-sixteenths, were desirous of having a sale of the property in order that they might receive immediate payment of their shares, while the Defendants, the owners of thirteen-sixteenths, were desirous of retaining their shares, and were willing to purchase the Plaintiffs' shares.

The question as to the rights of the parties was argued upon further consideration.

*Bristowe, Q.C., and Lewin, for the Plaintiffs:—*

The Plaintiffs are entitled to three-sixteenths of this property, and we say that we have a right to a sale under the 3rd section of the *Partition Act*. The saving clause as to purchase by any of the other parties contained in the 5th section does not apply to cut down the right under the 3rd section, but only applies to a case where a person not entitled to a moiety asks for a sale, and where there is no particular advantage to be gained by a sale in preference to a partition.

This is property which from its nature ought to be sold. It is impossible to put a value upon it without a sale, since there are great improvements going on in the town of *Birmingham*, and the situation of this property is such that it may command a very high price. The Court therefore ought to exercise the jurisdiction given by the 3rd section. The Defendants desire to purchase the Plaintiffs' shares, in order that they may have the property at a valuation according to its present value, whereas if sold by auction the full value will be obtained. It was held in *Williams v. Games* (1) that the Court has no power under the 5th section of the Act to order that the part owner who asks for a sale shall sell to the others, his share, at a valuation. It was laid down in *Drinkwater v. Ratcliffe* (2) that a sale ought to be directed under the 3rd section on account of the nature of the property and the number of parties interested, and because a sale would be more beneficial for the parties, which is exactly this case. In *Pemberton v. Barnes* (3), where your Lordship had refused to order a sale under the 4th section because it was against the wish of the

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(1) Law Rep. 10 Ch. 204.

(2) Law Rep. 20 Eq. 528.

(3) Law Rep. 6 Ch. 685.

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other owners of a moiety, it was held on appeal that a sale must be ordered, for that sect. 4 was imperative, and obliged the Court to direct a sale in such a case; and in *Roughton v. Gibson* (1) the owner of one portion of an estate was declared to be entitled to have a sale by auction, notwithstanding that the other part owners offered to purchase under sect. 5. In this case the only effectual means of fixing the value is by a sale, and this mode would not be more expensive than having a valuation of the property.

*Davenport*, for parties in the same interest desiring a sale.

*J. Pearson*, Q.C., and *Bardswell*, for the Defendants:—

It would be a great hardship upon the parties entitled to thirteen-sixteenths of the property to be driven into a sale by a minority of three-sixteenths. We believe that the value will increase, and it is precisely on that account that we wish to avoid a sale at the present time. The 3rd section of the Act applies to cases where the parties are so unreasonable as to require a partition of property that cannot advantageously be partitioned, but the 5th section is perfectly independent of the 3rd section, and applies to a totally different state of things, that is, where the minority desire a sale, and where the majority are willing to purchase at a valuation. We are desirous of purchasing, and the Court can without trouble ascertain the value of any property by skilled valuers, who will take into consideration the improving nature of the property. The case of *Williams v. Games* (2) does not apply to this, for there some of the parties wanted a partition. We do not ask for partition or for sale, but for purchase, and that comes under the 5th section. It has been urged that the Court is bound to order a sale, but Vice-Chancellor *Wickens* decided in *Allen v. Allen* (3) that the Court was not bound to order a sale against the wish of the owners of the larger share; and that the onus lay upon the owners of the smaller share, who desired a sale, of shewing that it was, under the circumstances, the most beneficial course for all parties.

The expense of a sale would be far greater than a valuation,

(1) 46 L. J. (Ch.) 366. *WMB77* (2) Law Rep. 10 Ch. 204.

32. 25th 2069.

(3) 21 W. R. 842. *WMB73175*.



since it would be necessary to have the title investigated, and to have conditions of sale prepared. The Court is not bound to order a sale contrary to the wishes of the majority who are willing to purchase.

*Glasse*, Q.C., and *Woodroffe*, for other Defendants objecting to a sale, cited *In re Langdale's Estate* (1), shewing that the Court would only order a sale in the absence of "good reason to the contrary," and contended that good reason to the contrary had been shewn in this case.

*Bristowe*, in reply.

MALINS, V.C.:—

This is a partition suit in which the property is virtually divided into sixteenths. The Plaintiffs, represented by Mr. *Bristowe*, and some other parties in the same interest, who are represented by Mr. *Davenport*, have amongst them three-sixteenths, while the parties represented by Mr. *Glasse* and Mr. *Pearson* have amongst them thirteen-sixteenths, making up the entirety. The property, it appears, is situate nearly in the centre of the town of *Birmingham*, in which certain improvements are stated to be going on, which may or may not have the effect of increasing the value of the property. Mr. *Bristowe* has, I think, admitted that the only object of his suit is to turn his shares into money, and to ascertain the money value of his three-sixteenths, while the owners of the thirteen-sixteenths do not desire to turn theirs into money at all, but desire to retain the property in specie for various reasons, amongst others, to take the chance of the increased value which they believe will arise from these improvements.

Mr. *Bristowe*, for his three-sixteenths, says, "I am entitled to have the utmost value that my shares will produce, and that can only be ascertained in one way, namely, by putting the entire estate up to auction, when the public will have an opportunity of bidding for it, and the highest bidder will have it, and I shall have the satisfaction of knowing that the highest price that could be obtained has been obtained for the property." That is the argu-

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(1) 5 L. R. Ir. Eq. 572.

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ment on that side. The other side say, "This will be a very grievous hardship on us to have our property, which we desire to retain, put up to auction merely for the purpose of ascertaining the money value of three-sixteenths out of sixteen-sixteenths." I must say I think it would, in this particular case, be a very considerable hardship; but there are many other cases in which the hardship would not only be considerable, but very grievous. Suppose a property to be held in twentieths—in some cases it might be held in hundredths—the owner of one-twentieth says his circumstances absolutely require that his share should be turned into money, and the nineteen-twentieths say, "This property has long been in the family, and we desire to retain it. Our affections are centred in the enjoyment of this property, and we desire that it should not be sold." Under those circumstances surely justice is completely met by ascertaining the money value of the twentieth which it is desired should be sold, giving the parties who are entitled to the nineteen-twentieths an opportunity of buying it, and becoming owners of the entire property. That seems to me to be reasonable. Then, again, cases may occur like *Pemberton v. Barnes* (1). In that case I took one view and Lord *Hatherley* took another view; but I am bound to say, having carefully considered Lord *Hatherley's* judgment again—not for the first time—and having carefully read my own judgment last night, I am very sorry that Lord *Hatherley* arrived at the conclusion he did, as I think, in the great majority of cases, instead of working justice it would work the greatest injustice. In *Pemberton v. Barnes* there was a large estate, with a mansion-house and nearly 4000 acres of land, which were perfectly capable of partition. It was a case under the 4th section, which says, upon the request of one of the parties there must be a sale, unless the owner of the other moiety can shew good cause to the contrary. I thought that good cause was shewn to the contrary, but it was decided that the estate must be sold, because one party desired to have it put up to auction, to ascertain what the greatest value of it was; and so I should be obliged to decide if a similar case came before me, although I should do it with the greatest possible reluctance. I have here a property which, it is contended, falls

(1) Law Rep. 6 Ch. 685.

within the 3rd section, because of the nature of the property and the number of the parties interested. I agree with Mr. *Bristowe* in his argument to this extent, that if I were bound here to partition the whole of the property or to direct a sale, then the difficulty of partition is admittedly so great that I think practically it could hardly be carried into effect, and I should therefore consider the case within the 3rd section, and should direct a sale and not a partition. But then comes the 5th section, which certainly is a most material section, because it seems the Legislature, foreseeing that cases might arise in which the great majority of persons interested in the estate might not desire partition or a sale, but to retain their property, and others might desire to have their shares in money, makes this provision: "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property." I may, therefore, in this case, which clearly falls within that section, direct a sale on the request of three-sixteenths, represented by Mr. *Bristowe*, "unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale." Independent of any authority or any decision, what does this mean? Can there be a doubt that it contemplates the very case which I have before me now, that the exigencies of some of the parties require their shares to be turned into money; and the only object is to ascertain the money value of the shares. Then the argument is, that from the circumstances existing in the town of *Birmingham* at present, nobody can ascertain the value, and this is confirmed by the affidavit of an auctioneer, Mr. *Fellowes*, who says that it is difficult, if not impracticable, at present to ascertain the value of such property as this. But, surely, because there is a difficulty about it, it would be a very hard thing that I should oblige the owners of thirteen-sixteenths of a property, out of sixteen-sixteenths, to have their property put up for sale in

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order that I might ascertain the value of three-sixteenths. The Legislature says I may have a valuation, and I must consider the Legislature as having said that a valuation is practicable, and to tell me that because a property is increasing in value I cannot find any one who can tell me what ought to be allowed for the probable increase of value, and that under any circumstances it is impossible for this Court to ascertain the value of that property, is going beyond anything I ever heard of. I cannot sanction such a notion at all.

Now, therefore, upon the interpretation of the language of the section, apart from any decision, I feel no doubt whatever that these three sections do meet the justice of every case. The 3rd section directs that there must be a sale where the nature of the property and the number of the interests render a partition impracticable; the 4th section directs a sale at the request of a moiety, unless good cause can be shewn to the contrary; and the 5th section provides for the case of these minute divisions of property, and says that all parties shall not be bound to sell their property where the only object is to ascertain the money value of one share, which necessarily must be turned into money.

The principle, therefore, is clear, and the Act is free from difficulty. Am I, then, prevented from coming to that conclusion by any decided cases? Mr. *Bristowe* relied very much upon the case of *Williams v. Games* (1), in which I find Lord Justice *James* expresses his view of the case exactly as I have done. The decision in that case was a reversal of the Master of the Rolls upon one point, which probably, as Mr. *Pearson* says, was decided *per incuriam*; it went as a matter unconsidered. There, there were parties interested in the property in sevenths. The order made by the Master of the Rolls directed a sale of the two-sevenths, and then a partition of the whole. Lord Justice *James* says this (2): "It is clear that the Act was intended for the benefit of those part owners who want to have a sale"—that is the case of Mr. *Bristowe*—"in which case the other parties interested who object to a sale"—which are the thirteen-sixteenths here—"may be compelled to buy the shares or have a sale." That is the very thing which is contended here. Not that they must submit to have the whole property sold, but

(1) Law Rep. 10 Ch. 204.

(2) Law Rep. 10 Ch. 205.



they must buy the shares or have a sale. Here they have expressed their willingness to purchase the shares. Mr. *Bristowe's* clients want the money, and Mr. *Pearson's* clients are ready to find the money to buy the shares, and the only difficulty is to say how much they are to give them. Then Lord Justice *James* says: "But there is nothing to compel a man to sell his share"—Mr. *Bristowe* does not want to be compelled, because he offers to sell, his only object is to sell—"The whole section is for the benefit of those who want a sale"—that, again, is Mr. *Bristowe*.—"If the result of a Plaintiff asking for a sale of the whole is that he must give up his share and have it valued, he may be compelled to move to vary the certificate, and then to appeal to this Court, and so be put to much expense on which he did not calculate. He may, on being put to such terms, withdraw his request for a sale and have a partition." I confess that last part I do not quite understand.

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Mr. *Bristowe* :—I suppose that means I might, if I liked, withdraw my request for a sale, and insist upon a partition.

MALINS, V.C. :—Mr. *Bristowe* relies—I confess I am at a loss to see why—upon the decision of the Master of the Rolls subsequently in the case of *Drinkwater v. Ratcliffe* (1). There the case was this: "Property, consisting of a farmhouse and buildings and thirty acres of land, was divisible into thirty-six shares; fifteen of them were vested in eight persons, who desired a sale, six of them being entitled to one-thirty-sixth share each; the remaining twenty-one were vested in a married woman living apart from her husband"—the owners of fifteen shares out of thirty-six desired a sale—"the married woman was in occupation of the farm and opposed a sale, and was willing to give an undertaking to purchase the fifteen shares, but her husband did not join therein." She was separated from him, and she could not have any communication with him. What was the difficulty in the way of the Master of the Rolls? Not that there was not a right conferred by the 5th section, but that no undertaking within the meaning of the Act could be given. The Master of the Rolls would not have gone into a long

(1) Law Rep. 20 Eq. 528.

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discussion upon a question whether she was capable of binding herself by an undertaking if he had come to the conclusion which Mr. *Bristowe* desires me to come to, that this section has no application whenever any of the holders of a small part of the property desire a sale. It all proceeds upon this: not that the parties interested had no right to buy, on the contrary, the parties interested had a right to buy out the shares of those desiring to sell, but that the married woman who offered the undertaking was incapable of binding herself by it. Those are both decisions in conformity with the conclusion I arrive at here, that in this case, as in all other cases where owners of part of the property, particularly when it is a small portion of the property, desire to turn their share into money, there is a right in the owners of other parts to buy; they are not bound to submit to sell their shares for the purpose of ascertaining what the value of the property is, but they have a right to buy out those who desire to turn their shares into money if they give this undertaking; and it becomes the duty of the Court to ascertain what the value is, in order that the parties who desire to retain the property may have an opportunity of paying them out in money. In this case, in my opinion, the proper course for Mr. *Bristowe's* clients to take is, to name a price which they are willing to take, and the parties who desire to retain the property will of course say whether they are willing to accept those terms. If they decline to do that, then the value must be ascertained in Chambers in such a manner as I shall decide, either by consulting a single valuer, or by having two valuers with power to appoint an umpire.

Of course I shall direct whoever values this property to value it having regard to all the surrounding circumstances, and to take into consideration the probable increase in the value of the property by the contemplated improvements in the town of *Birmingham*. Mr. *Bristowe* says that this would be quite as expensive as putting the property up to auction. Mr. *Bristowe* may think so, but I cannot agree with him as to that. I am told that the expense of putting it up to auction would be £700 or £800, and I dare say it would, because there would have to be an investigation into the title, which is expensive, and I must have the conditions of sale drawn with reference to the state of the title. Auctioneers must

be employed, commissions paid, and advertisements issued. If I cannot get this property valued for 100 guineas I shall be greatly surprised. Therefore I am quite satisfied that I can comply with what the Legislature has imposed upon me in order to ascertain the value of the property, and having ascertained the value of the property, the Defendants represented by Mr. *Glasse* and Mr. *Pearson* must undertake to purchase at the value so to be ascertained.

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*J. Pearson*:—We will undertake to do that, my Lord. My clients are the owners of five-eighths. The Act says, “the parties or some of them,” and in the words of the Act my clients undertake to purchase. The persons are *sui juris*. They are *Peter Pitt*, *Joseph Ballard Pitt*, and *William Pitt*, who will give the undertaking. A similar decree was made by the Master of the Rolls in *Williams v. Games* (1), “that certain of the Defendants undertaking to purchase the two-sevenths, a valuation thereof should be made in Chambers.” Then we will accept the title subject to the Plaintiffs shewing that their shares are free from incumbrance since the date of the Chief Clerk’s certificate.

*Bristowe*:—There is a further difficulty, which is this. The 3rd section proceeds upon the footing of the sale being at the request of any of the parties interested. It will be necessary to preface the order by the names of the parties who desire it. If it is under the 5th section that request would be unnecessary. We do not ask for a sale under the 5th section, but under the 3rd section. Rather than go under the fifth section, I would withdraw my request for a sale of the property.

MALINS, V.C.:—I cannot have the parties argue strenuously for a sale of the property, and then, when they find the order does not suit them, turn round and say they do not wish for a sale. I will not allow the request to be withdrawn. I will have the order prefaced with the words, “The Plaintiffs and the parties represented by Mr. *Davenport* requesting a sale, and all the other parties resisting a sale and not desiring a partition, and *Peter Pitt*, *Joseph B. Pitt*, and *William Pitt* undertaking to purchase the

(1) Law Rep. 10 Ch. 204.

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shares of the parties desiring a sale, order valuation of such shares to be made at Chambers, and sale and purchase accordingly. The conveyance to be settled in Chambers if the parties differ. The costs of suit and of carrying the decree into effect to come out of the estate rateably in proportion to the shares."

Solicitors: *Letts Brothers; Gamlen & Son*, agents for *Cottrell & Son, Birmingham; Robinson & Preston; Milward & Whitehead.*

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May 22.

## BRIDGES v. STRACHAN.

[1874 B. 3.]

*Devise of Land—Bequest of Money to same Uses—Revocation of Devise—No implied Revocation of Bequest.*

A testator devised freeholds in *Dorsetshire* upon certain trusts, and bequeathed £3000 to his trustees to purchase lands in *Dorsetshire* to be held upon the same trusts. By a codicil he revoked the devise of his freeholds, and declared other trusts without alluding to the £3000:—

*Held*, that there was no implied revocation of the bequest of £3000, which would pass under the will as if no codicil had been made.

Statement.

*WILLIAM PAGE*, by his will, dated the 31st of March, 1852, amongst other things, gave his freehold lands and hereditaments in the parishes of *Stoke Abbot* and *Burstock*, in the county of *Dorset*, to three trustees and their heirs, to the use of his second daughter, the Defendant *Elizabeth J. Strachan*, and her assigns for her life, with remainder to the use of her first and other sons in tail, with subsequent remainders over. The testator also gave and bequeathed to his trustees the sum of £3000 consols upon trust to lay out the same in the purchase of lands in the county of *Dorset* of not less value than £2000, and to be held in fee simple or for a term of years of which at least 100 should be unexpired, and to settle the estates so to be purchased to the same uses and subject to the same powers and authorities as were expressed and declared by his will of and concerning his lands and hereditaments situated in the said county of *Dorset*, and if the whole £3000 should not be expended in the said purchase, then to lay out and expend the residue in the erection, enlargement, or repair of build-



ings, or in any other permanent improvements on the lands and hereditaments in the county of *Dorset*, or such estates so to be purchased as the trustees should think expedient, and if any surplus still remained, to pay the same over to the person who should for the time being be tenant for life of the *Dorsetshire* lands and hereditaments for his own use and benefit.

By a codicil to his will dated in February, 1854, the testator revoked the devise in his will contained of his freehold hereditaments in the county of *Dorset*, and in lieu thereof he gave the same to the use of his trustees and their heirs until the Defendant *Augustus Strachan*, the first and eldest son of *Elizabeth J. Strachan*, should attain the age of twenty-one, with remainder to the use of *Augustus Strachan* and his assigns for life, with remainder to the use of his first and other sons in tail, with remainders over as directed by his will.

The testator died in April, 1861. *Elizabeth Strachan* was a widow and had four children, all of whom were Defendants. No part of the £3000 had been yet invested in lands.

The principal question now argued upon further consideration was whether, the devise of the *Dorsetshire* estates having been revoked by the codicil, the gift of the £3000 to be laid out in the purchase of lands in *Dorsetshire* to be held upon the same trusts, was revoked by implication.

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*Dickins*, for the trustees, stated the case.

Argument.

*W. Barber*, for *Elizabeth Strachan*, the second daughter of the testator:—

There is no express revocation of the gift of £3000 in the codicil, and without such express revocation the gift remains, notwithstanding the revocation as to the freeholds. The revocation only applies to part of the trusts. By the will a life estate is given in the freeholds to *Elizabeth Strachan*, and by the codicil there is a direction to accumulate the rents until her eldest son comes of age.

In the case of *Darley v. Darley* (1), where there was a devise of freeholds and a bequest of leaseholds to be conveyed to the same

(1) Amb. 653.

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uses, and the testator afterwards suffered a recovery by which the devise of the freeholds was revoked, it was held that the bequest of the leaseholds was also revoked, but this decision was reversed in the House of Lords in *Darley v. Langworthy* (1); and in *Francis v. Collier* (2), where a testator directed freehold estate to be sold and applied on the trusts of the residuary personal estate, and then revoked by codicil the gift of the residuary personal estate, it was held that the freehold estate went upon the uses expressed as to the residuary personal estate: *Theobald on Wills* (3).

*Colquhoun*, for the eldest son of *Elizabeth Strachan* :—

The evident intention of this testator was that the £3000 should be applied in increasing the property already held by him in *Dorsetshire*, and when he revoked the life estate to his daughter as to the freeholds he must have intended that revocation to extend to the money to be applied for the advantage of the *Dorsetshire* estate.

In *Lord Carrington v. Payne* (4), where there was a devise of lands, and a bequest of personal estate to be laid out on land to be settled to the same uses, and a subsequent revocation of so much as settled the real estate on the sons and a variation of the uses, it was held not to be a revocation, but substitution of other uses, and therefore to extend to the estate to be purchased with the personal estate. In *re Gibson's Trusts* (5) also supports this view that the gift of the £3000 is revoked by implication: *Jarman on Wills* (6).

*T. H. Kekewich*, for the other Defendants.

Judgment.

MALINS, V.C. :—

The question I now have to decide is whether the revocation by the codicil, of the devise of the freehold estates in *Dorsetshire* acts as an implied revocation of the gift of £3000 to be laid out in the purchase of lands in *Dorsetshire*, to be settled to uses similar to those of the freehold estates in *Dorsetshire*. It may be that the testator intended to revoke the latter gift of £3000, and I think

(1) 3 Bro. P. C. 359.

(2) 4 Russ. 331.

(3) Page 424.

(4) 5 Ves. 404.

(5) 2 J. & H. 656.

(6) 3rd Ed. p. 167.

in all probability his object was to extend the *Dorsetshire* estate, but he has omitted any reference to the £3000 in his codicil. Therefore on principle there is no implied revocation. I think that notwithstanding the case of *Lord Carrington v. Payne* (1), no revocation takes place unless a clear intention is expressed. *Darley v. Langworthy* (2) supports that view, and the last case cited by Mr. Barber of *Francis v. Collier* (3) is in conformity with that principle.

I think, therefore, that the rights of the parties are the same with regard to the £3000 as if the codicil had never been made, and that *Elizabeth Strachan* is entitled for life under the bequest in the will.

Solicitors: *Trinders & Curtis-Hayward; Hadden, Woodward, & M'Leod.*

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Judgment.

### SMYTH v. SMYTH.

[1877 S. 17.]

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1878  
June 1.

*Will*—" *Sheep and all the Rest, Residue, and other Effects*"—*Freehold Estate included.*

A testator gave two legacies, and then gave his sheep and all the rest, residue, moneys, chattels, and all other his effects, to be equally divided among his four brothers, whom he appointed his executors :—

*Held*, that all the freehold as well as personal estate of the testator passed under these words.

**HENRY SMYTH** made his will on the 24th of February, 1852, in these words: "I give unto Miss *Sarah Ann Banbury* the sum of £100, also I give to my brother *John Smyth* the sum of £50, and lastly I give my sheep and all the rest, residue, moneys, chattels, and all other my effects, to be equally divided among my brothers *John Smyth, James Smyth, Richard Smyth, and William Smyth*, whom I hereby constitute and appoint as the sole executors to this my last will and testament."

Statement.

The father of the testator had died in December, 1851, two months before the date of this will, and had devised certain real estate to his son.

(1) 5 Ves. 404.

(2) 3 Bro. P. C. 359.

(3) 4 Russ. 331.

V.-C. M.      This action was one for partition, and a question was now raised  
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upon further consideration whether the real estate of the testator, *Henry Smyth*, passed under his will or whether it descended to his heir-at-law.

Argument.
 ———

J. Pearson, Q.C., and E. Harrison, for the heir-at-law of the testator :—

We contend that the real estate which the testator had does not pass under this will. There is no doubt that in some cases the words “rest, residue, and effects” would be sufficient to include real estate, but this is not so unless you can discover an intention on the part of the testator to include something beyond personal estate. There is no expression whatever in this will to shew that the testator intended to deal with anything but personalty, and in the absence of such expressed intention the heir cannot be disinherited. The father of the testator died shortly before the date of his son’s will, and there is no evidence to shew that the testator even knew that he was entitled to any real property. The words he uses are applicable especially to chattels—his sheep, moneys, chattels, and all other his effects, shewing that he meant the word “effects” to include things *ejusdem generis* with those articles he had specified.

The cases in support of this view are *Bebb v. Penoyre* (1), *Camfield v. Gilbert* (2), *Doe v. Rout* (3), *Doe v. Dring* (4), and *Doe v. Earles* (5).

Hinde Palmer, Q.C., and W. Karlake, for the legatees :—

When a testator sits down to make a will it may be supposed that his intention is to dispose of all that belongs to him, and there is nothing in this will to induce any one to suppose that this testator did not intend to carry out that object. He was a farmer, and evidently not versed in legal phraseology. He first thought of his sheep, which no doubt constituted in his mind his most valuable property, and then he used words which to any ordinary mind would include every earthly thing he possessed :

(1) 11 East, 160.

(3) 7 Taunt. 79.

(2) 3 East, 516.

(4) 2 M. & S. 448.

(5) 15 M. & W. 450.

all the rest, residue, moneys, chattels and effects; that must mean all the rest and residue of his property; and if he had said that and no more, the real estates must have passed without question. It was held in *King v. George* (1), that an enumeration of particular articles did not abridge or cut down the effect of general words. There is nothing in this will to restrict the meaning of "rest and residue;" and the word "effects" was held to pass real estate in *Milsome v. Long* (2).

The opinion of the Master of the Rolls in *Titchfield v. Horncastle* (3) is strongly in favour of real estate being included in "effects," though it was not necessary to decide that question. In *Doe v. Langlands* (4) the words "all and every the residue of my property, goods and chattels," passed real estate; and the words "real effects" were held in *Jackson v. Hogan* (5) to pass the inheritance of the testator's real estate; that case was referred to and followed in *Lord Torrington v. Bowman* (6).

In the case of *Glover v. Chancellor* (2nd May, 1876), your Lordship expressed an opinion that the word "effects" would carry real estate, and the following cases are in favour of our contention: *Attree v. Attree* (7), and *Jull v. Jacobs* (8); and the observations in *Jarman on Wills* (9).

These later cases have superseded the older authorities.

J. Pearson, in reply, cited *Bowman v. Milbanke* (10).

MALINS, V.C.:—

The testator in this case having both real and personal estate, the question is, whether the words of his will are sufficient to pass real estate. It is contended by Mr. *Pearson* and Mr. *E. Harrison* that they are insufficient for the purpose, and by the other side it is argued that the words will pass real estate.

Now in the construction of wills it is the duty of the Court, in the first place, to ascertain from the words used by the testator what his meaning was, and to give effect to that meaning if words

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| (1) 4 Ch. D. 435; 5 Ch. D. 627. | (6) 22 L. J. (Ch.) 236. |
| (2) 3 Jur. (N.S.) 1073. | (7) Law Rep. 11 Eq. 280. |
| (3) 7 L. J. (Ch.) 279. | (8) 3 Ch. D. 703. |
| (4) 14 East, 370. | (9) 2nd Ed. chap. xxii. p. 622. |
| (5) 3 Bro. P. C. 388. | (10) Lev. 130. |

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are to be found sufficient for the purpose. What, then, was the intention of the testator? My opinion is that the testator could not have intended to die intestate, but he intended to dispose of everything he had in the world. I believe in using the words "all the rest and residue" he meant the rest and residue of everything, that is, all the property of every description which he had not already given away. Then he adds, "moneys, chattels, and all other my effects." It has been argued that the word "effects" will not pass real estate. Why it should not I cannot tell, but I certainly do not agree with the argument. There is the decision of *Doe v. Dring* (1), which is no doubt the decision of a very eminent Judge, Lord *Ellenborough*, but, like all Judges at that period, he felt himself bound by the peremptory rule of law, "that the heir shall not be disinherited unless by plain and cogent inference arising from the words of the will." There the words were, "I do give and bequeath to my wife *Elizabeth* all and singular my effects of what nature or kind soever, to her own use and enjoyment during her life, and at her death to be equally divided between our surviving children." Lord *Ellenborough* in that case had no doubt that it was the intention of the testator to convey all his property, both real and personal, for the maintenance of his family, but he felt himself compelled to decide that the words would not pass real estate. So, because the testator called his property "effects," it was decided that nothing but personal property could pass. Lord *Ellenborough* there said he never knew of a case in which the Court had been called upon to hold that effects would pass real estate denuded of all context, unless, indeed, the words "of what nature or kind soever" could be considered to explain it. But although the testator says "of what nature or kind soever," yet it was decided that only chattels passed. Mr. Justice *Bayley* in that case says, "I have considerable doubts upon this case." Then he says the word "effects" might be made to pass the real, or might be confined to personal, estate according to the context, but "effects" *per se* had never been held to pass real property, and so they came to the conclusion that the real estate did not pass, although they admitted that the testator intended to give the whole of his property.

(1) 2 M. & S. 448.

In the case of *Glover v. Chancellor* I expressed my dissent from that decision, and I do again express my dissent from it, and in such a case I should decide that everything passed. Then, Mr. *Pearson* relied on other authorities which are, in my opinion, entirely exploded.

The first was the case of *Bebb v. Penoyre* (1), where the words were "all the rest and residue," and they were held not to pass real estate, because the words followed a direction for the sale of the lease of his house and his furniture, and appointed executors.

The next case was *Camfield v. Gilbert* (2), where the words were still stronger. "I will, bequeath, and devise all the rest, residue, and remainder of my effects, wheresoever and whatsoever, and of what nature, kind, or quality soever." Yet these words were not sufficient. Although it is admitted that the word "devise" is technically considered as more applicable to real than to personal estate, still here, also, from this principle of favouring the heir-at-law, it was decided that the real estate did not pass.

There is, also, one more decision in favour of the views held at that time of day, namely, the case of *Doe v. Rout* (3). There the words were, "all my stock-in-trade, household goods, wearing apparel, ready money, securities for money, and every other thing my property of what nature or kind soever;" in other words, it was a gift of every other part of his property: and there, again, it was held that the words did not pass real estate.

Those are the principal cases decided in favour of the Plaintiff's contention, that the words do not pass real estate. Then we come to cases of a different description, all decided at a much more recent period. But, first, I will ask what is the duty of the Court in construing a will? The duty is first to find out the meaning of the testator; and on that subject I have no hesitation in expressing my conviction that this testator intended to dispose of all his property. If he had only said all his property and all his effects, I think there can be no doubt that those words would have passed everything he had; but when he says, "I give all the rest and residue," meaning all he had not disposed of, that is said not to pass the whole of his property.

(1) 11 East, 160.

(2) 3 East, 516.

(3) 7 Taunt. 79.

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The first case I will refer to, which has been cited by the Defendant's counsel, is *King v. George* (1), where the testatrix said: "I do bequeath to A. G. all that I have power over," and then she goes on to enumerate certain articles, "namely, plate, linen, china, pictures, jewellery, lace," intending there should be no mistake about those articles being included. I had there to decide whether the generality of expression, "all that I have power over," was cut down by an enumeration of particular articles. I held that the general bequest was not to be cut down, and that decision was affirmed by the Court of Appeal.

Now, as regards the earlier cases, I have expressed my opinion that those cases, although decided by great Judges, were decided at a time when there was that extraordinary leaning in favour of the heir-at-law. I believe, however, that they are not now considered as authorities, and I unhesitatingly express my opinion that they are no longer law.

The decisions in more recent times have been very different, and are much more liberal in the construction of wills.

In the case of *Jull v. Jacobs* (2) I considered that there was an intention on the part of the testator to dispose of a particular part of his property in each paragraph, and looking at the whole frame of the will I thought the testator meant to dispose of the remainder of that subject which was mentioned in a particular paragraph. Then with regard to *Attree v. Attree* (3), I said that although I came to the conclusion that there was no general residuary gift, I should have had no difficulty in deciding otherwise in *Attree v. Attree*, because there the testatrix, after a gift of her house and garden, which were leasehold, and several pecuniary legacies, directed that "all the rest" should be divided between certain persons, and it was held that the words included realty as well as personalty.

The same doctrine was applied in *Milsome v. Long* (4), where Lord *Hatherley*, then Vice-Chancellor, held that the words "stock-in-trade, money, book debts and effects" carried the reversion in real estate; and in *Titchfield v. Horncastle* (5) the Master of the

(1) 4 Ch. D. 435; 5 Ch. D. 627.

(3) Law Rep. 11 Eq. 280.

(2) 3 Ch. D. 703.

(4) 3 Jur. (N.S.) 1073.

(5) 7 L. J. (Ch.) 279.

Rolls expresses an opinion very much in accordance with what I have said. Lord *Langdale* there observed: "A great deal might be said as to the meaning of the word 'effects.' It was understood by Lord *Mansfield* to be equivalent to property or worldly substance. It has been certainly considered that its primary interpretation is to be confined to personal estate only, and that unless it is connected with some other words it will not comprise real estate. I do not mean to express any opinion of my own on that subject. I am not aware that the word 'effects' may not be as applicable to real estate as to personalty, but I do not think it necessary to give any decision on such a point." Lord *Langdale* must have thought, as I think, that the word "effects" would carry every sort of property which the testator had. *Doe v. Langlands* (1) is not applicable to the present case.

Then Mr. *Pearson*, in reply, cited the case of *Bowman v. Milbanke* (2), in which the words were, "I give all to my mother, all to my mother," and the Court said, "'All' is altogether uncertain, and not sufficient to disinherit an heir," and it was decided that lands did not pass. If those words did not pass all the testator had, I cannot conceive what they did pass. However, such a decision as that cannot be considered an authority now.

The doctrines of the Court are more liberal at the present day. I am glad to find that the views I have expressed are supported by Mr. *Jarman*, who says, after referring to the cases I have cited (3), "The last cases are certainly important authorities, and they demonstrate the inclination of the Courts at the present day to hold lands to pass under words capable *per se* of comprehending them, notwithstanding their association with terms applicable to personalty only. To reconcile all the cases would require the adoption of some very subtle and unsubstantial distinctions; but the preceding review will convince the reader of the necessity of withholding implicit reliance from some of the early decisions in which the restricted construction prevailed."

My duty is to look at the words; and finding here a man, a farmer unacquainted with law, using words which in the ordinary acceptance would mean everything he had, and intending, as I

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(1) 14 East, 370.

(2) Lev. 130.

(3) 3rd Ed. p. 693.

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believe, to give his property generally, I will do what I can to carry out his intention.

By these words, "I give all the rest, residue, moneys, chattels, and all other my effects," I am of opinion that the testator meant to include everything he had in the world, whether real property or personal property, and to pass all the residue of every kind soever not otherwise disposed of; and I also think that the testator did not intend to die intestate as to any of his property, but to pass everything under his will.

The costs will be costs in the cause.

Solicitors for Plaintiff: *Guscotte, Wadham, & Daw.*

Solicitor for Defendants: *T. Sismey.*

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[1877 H. 309.]

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May 9.

Pleading—Counter-claim—Rules of Court, 1875, Order XXII., r. 9.

To an action by executors for the purpose of charging a married woman's separate estate with a debt to their testator contracted on the faith of such separate estate, the husband, who had been made a Defendant, and his wife raised a counter-claim for money belonging to the wife, not part of her separate estate, and for certain chattels in the possession of the testator at his death, which it was alleged were the property of the husband:—

Held, on motion under Rules of Court, 1875, Order XXII., rule 9, that the claim to the chattels and money was a proper subject of counter-claim.

MOTION on behalf of the Plaintiffs that the counter-claim of the Defendants *A. E.* and *Giovanni Mochi*, so far as it sought to establish the claim of *G. Mochi* to certain property, might be struck out, or, in the alternative, that *G. Mochi* might be ordered to give security for the costs of the counter-claim.

By their action the Plaintiffs, as executors of General *Hodson*, claimed payment of a sum of £587 10s. 5d. as a debt due to their testator for advances made by him in April and August, 1876, to the Defendant *Agnes Elizabeth Mochi*, on a stipulation for repayment out of her separate estate.

Mrs. *Mochi* was entitled, under the will of her first husband, to an annual income of £600 for her sole and separate use, independently of her present husband, *Giovanni Mochi*, whom she married in 1874. General *Hodson* had, from 1872 until 1876, boarded with Mrs. *Mochi* in various places in *England* and *France*. In 1876 Mrs. *Mochi* left *England* to join her husband at *Santiago*, in *Chili*, where he held an appointment. The Plaintiffs by their statement of claim alleged that Mrs. *Mochi*, in 1876, before she left for *Chili*, borrowed considerable sums from General *Hodson*, and that in April and August of that year the General advanced her two sums of £224 and £350, it being stipulated that these advances should be repaid out of her separate income at the rate of £150 a quarter. The Defendant *Giovanni Mochi*, as the husband of *Agnes Mochi*, had been joined with her as a Defendant to the action.

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By their statement of defence the Defendants denied that any sum was due from Mrs. *Mochi* to the Plaintiffs in respect of her separate estate or otherwise. Small sums of from 200 francs to 300 francs were occasionally borrowed by her from General *Hodson*, but were invariably repaid. And by way of counter-claim the Defendants stated that General *Hodson* had in his possession at the time of his death four paintings belonging to the Defendant *Giovanni Mochi*; that shortly before General *Hodson's* death Mrs. *Mochi* sent him 500 francs, with a request that he would discharge some liabilities on her behalf. The letter arrived in *England* after General *Hodson's* death, but he had in his lifetime discharged a portion of such liabilities to the amount of 100 francs. The 500 francs and also the pictures had come to the hands of and were retained by the Plaintiffs as his executors, and by their counter-claim the Defendants claimed a delivery of the four pictures and payment of the balance of 400 francs.

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*Russell Roberts*, in support of the motion:—

The husband, against whom no relief is prayed, but who has been made a mere formal Defendant, has taken advantage of this to set up a counter-claim amounting to an action for detainee in respect of four pictures in the Plaintiff's possession alleged to belong to him. This counter-claim, which under the Rules of Court, 1875, Order XIX., rule 3, has taken the place of the old cross bill, is wholly irrelevant to and does not touch the subject-matter of the original action, which is a claim against the wife's separate estate only. Under the old practice a cross bill, so called, which was not a defence to anything contained in the original bill but raised a totally independent case, not touching the same matter, was demurrable: *Moss v. Anglo-Egyptian Company* (1); *Mitford* on Pleading (2); and by Order XXII., rule 9, where the claim raised by the counter-claim ought not to be disposed of by way of counter-claim but in an independent action, the Plaintiff is entitled to apply that such counter-claim may be excluded.

*Yate Lee*, for the Defendants, was not called upon.

(1) Law Rep. 1 Ch. 108.

12 June 1878

(2) Page 240.



BACON, V.C.:—

I can find no pretence at all for the present application. The Judicature Acts were intended to simplify procedure in actions and to diminish expense, and if I were to yield to this application I should be making them Acts to encourage chicanery. The husband is a necessary party, and in their defence and counter-claim he and his wife state that General *Hodson* (now represented by the Plaintiffs, his executors) had in his possession certain pictures belonging to the husband and a balance of 400 francs, and they claim the delivery up of these pictures and money. In my opinion this is a very suitable subject for a counter-claim, and the motion must be dismissed with costs.

Solicitors: *H. J. Mead; Hayes, Twisden, & Co., agents for R. S. Hawkins, Oxford.*

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## SCHOOL BOARD FOR LONDON v. FAULCONER.

[1877 L. 17.]

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May 21, 22.

*Charity Estate—Scheme—Appropriation of Income in aid of Expenses of a School—Transfer of School to a School Board—Right of School Board to the Endowment—Elementary Education Acts, 1870, 1873 (33 & 34 Vict. c. 75, s. 23; 36 & 37 Vict. c. 86, s. 13).*

By the terms of a scheme, approved in 1852, for appropriation of the increased revenues of a charity estate originally applicable to the relief of the poor, it was provided that a sum of £90 should be paid by the charity trustees to the treasurer of a school association in aid of the expenses of a school in *Flint Street, Walworth*, "or any other school that may be established in its stead," provided that no sum should be paid to any denominational school; and that if such school should "become materially altered in discipline, number of children, or other circumstance," then the £90 should "in the discretion of the trustees" be applied "for educational purposes amongst other schools of a similar character" in the parish.

A transfer of the *Flint Street* School and its endowment having been made by the managers to the School Board for *London*:—

*Held*, that the *Flint Street* School had not by the fact of such transfer become "materially altered in discipline, number of children, or other circumstance;" and that the trustees were bound to pay the endowment of £90 a year to the School Board.

By an order of the Court of Chancery, dated the 25th of June, 1852, and made in the matters of certain specified charity estates,

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which were portions of the copyhold charity estates of the parish of *St. Mary, Newington, Surrey*, a scheme for the appropriation of the increased revenues of the charities was approved of.

Clause 4 of the scheme was as follows :—

“That the sum of £90 a year be paid ” (by the charity trustees) “to the treasurer for the time being of the *St. Mary, Newington School Association*, for the education of the children of the poor of every religious denomination, to be appropriated by the committee for the time being of such association in aid of the charges and expenses attendant upon carrying on the school in *Flint Street, Walworth*, or of any other school that may be established in its stead, provided that no sum shall be paid to any school which shall become the property of any exclusive denomination or sect, or exclude by reason of its regulations the children of any class or denomination of persons.”

The 10th clause was as follows :—

“That as to £300 a year to be appropriated to the respective schools mentioned in clauses 4, 5, 6, 7, 8, and 9, if either of such schools shall not at any time hereafter or from time to time fall substantially within the description of school, or within the terms of such grant, or if such school shall become materially altered in discipline, number of children, or other circumstance, then the application of so much of the £300, the proportion of such school, shall in the discretion of the trustees be in the appropriation of such trustees for educational purposes amongst other schools of a similar character in the said parish, subject to the same conditions or provisions as contained in the said 4th clause.”

The 11th clause provided for the application of funds not appropriated by the previous clauses.

Under the above scheme the *Flint Street School, Walworth*, was, until the year 1873, carried on under the direction of managers, the expenses being partially defrayed by annual subscriptions. The sum of £90 a year, being “the proportion” above mentioned of the *Flint Street School*, was always paid to the managers by the trustees for the time being of the charity estates.

In the year 1870 the first *Elementary Education Act* (33 & 34

Vict. c. 75) was passed, which enables managers of any elementary school to transfer their school to a School Board; and the following clauses of the enabling section became of importance in this case:—

Sect. 23. “The managers of any elementary school in the district of a school board may, in manner provided by this Act, make an arrangement with the school board for transferring their school to such school board, and the school board may assent to such arrangement” . . . .

“An arrangement under this section may provide for the . . . . transfer or application of any endowment belonging to the school, or for the school board undertaking to discharge any debt charged on the school not exceeding the value of the interest in the school-house or endowment transferred to them.”

“When an arrangement is made under this section, the managers may, whether the legal interest in the school-house or endowment is vested in them or in some person as trustee for them or the school, convey to the school board all such interest in the school-house and endowment as is vested in them or in such trustee, or such smaller interest as may be required under the arrangement.”

In 1873 an arrangement for the transfer of the *Flint Street School, Walworth*, to the School Board for *London*, and of the premises in which the same was carried on, and of the above-mentioned endowment of £90 a year, was duly made under the Act of 1870, and was duly approved, according to the provisions of the Act, by the School Board, the managers of the school, the subscribers to the school, and the Education Department of the Privy Council; and by an agreement, dated the 23rd of September, 1873, and made between the then managers of the first part, the trustees of the school premises of the second part, and the *London School Board* of the third part, it was agreed as follows:—

“1. The managers hereby transfer the school to the board, and the managers and trustees agree to assign to the board, and the board agree to accept an assignment of the school-house and premises.

“2. The managers shall, so far as they lawfully can, transfer absolutely to the board the said endowment of £90 per annum.

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“3. Possession of the school-house, and of the school books, furniture, and effects now therein, shall be given to the board on the day of the date hereof, from which date the board undertake the exclusive management of the school, and the school shall thenceforth be deemed to be a school provided by the board within the meaning of the said *Elementary Education Act*, 1870

“6. The board, in consideration of the transfer to them of the said endowment of £90, shall pay to Mr. *Thomas Watson*, the present master of the school, an annuity or yearly sum of £100 during his lifetime.

“7. The board shall also, for the said consideration, in case *Priscilla Watson*, the wife of the said *Thomas Watson*, shall survive her said husband, pay to her an annuity or yearly sum of £60 from the date of her husband's death for and during the remainder of her lifetime.”

By an indenture dated the 4th of June, 1875, and made between the managers of the first part, the trustees of the school premises of the second part, and the *London School Board* of the third part, the trustees, at the direction of the managers, assigned, and the managers assigned and confirmed, to the *London School Board* the premises on which the school was carried on, subject as therein mentioned; and the managers, “so far as they lawfully could,” assigned to the *School Board* the endowment of £90, with power in the names of the managers to sue for and recover the same.

In accordance with the above agreement of September, 1873, the *London School Board* took, and had ever since been in, possession of the *Flint Street School, Walworth*.

The writ in this action was issued by the *London School Board* against the trustees of the *St. Mary, Newington Charity Estates*; and the statement of claim alleged that the school under the Plaintiff's management was not the property of any exclusive denomination, but had continued to be and fell within the description of school mentioned in paragraph 4 of the scheme; and that the school had not become “materially altered in discipline, number of children, or other circumstance.”

The claim then alleged that the Plaintiffs had requested the Defendants to pay the annual sum of £90 to them, but that the

Defendants refused to make such payment, and claimed a declaration that the Plaintiffs, as transferees and managers of the school, were entitled to receive out of the income of the charity estates the annual sum of £90, which by the order of June, 1852, was directed to be paid to the treasurer for the time being of the *St. Mary, Newington* School Association.

The statement of defence, after describing the origin of the charities, shewing that they were at first intended for the relief of the poor, went on to allege that the *Flint Street* School had become "materially altered" in circumstances within the meaning of paragraph 10 of the scheme; that, the original object having been to give special advantages to the poor of *St. Mary, Newington*, in furtherance of such objects, part of the income was appropriated to the local schools, whereby poor inhabitants obtained advantages which they would not otherwise have had; that the payment of the £90 a year to the School Board would give to the poor inhabitants no greater advantage than they would have if no such payment were made; that the payment would go into the general funds of the Board; that no diminution would be made in the school fees, and that no benefit to the parish would accrue except a small diminution in the general rates, their proportion of which would amount to about 27s. a year.

The defence further alleged that the payment of a pension to the superannuated head master and his wife was contrary to the scheme and the original object of the charity.

The Defendants submitted that this £90 a year was not an endowment which the managers were enabled by the statute to transfer; that the *Flint Street* School had ceased to be a local school, and was now one of the general schools of the metropolis; and that the £90 a year was otherwise required for the benefit of the poor of the parish, and ought to be so applied.

For the Plaintiffs it was proved that the character of the school remained unaltered, except that girls were admitted as well as boys; that the numbers had somewhat increased, especially from within the parish, and that the efficiency of the school was improved.

Mr. *Burgess*, the clerk to the Defendants, and to the trustees of

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the other charity estates in the parish of *St. Mary, Newington*, deposed as follows:—

“If the £90 a year in the pleadings referred to were paid to the Plaintiffs, the poor inhabitants of the parish would derive no advantage therefrom. Their position would be practically the same as if no such payment were made. The payment would go into the general funds of the board, which are applied generally for the benefit of all the board schools of the metropolis, and no diminution would be made in the school fees in the parish of *St. Mary, Newington*, or other benefit accrue to the schools in the said parish by the £90 a year being paid to the board.

“I have calculated the amount of diminution of the rates for the School Board which would be effected by the board’s independent income being increased by £90 ; and I find that such diminution would, so far as the parish of *St. Mary, Newington*, is concerned, be represented by a diminution of the rates in that parish of 27s. a year only, or thereabouts.

“There are many charitable objects within the 11th clause of the scheme of 1852 to which the £90 a year might be usefully applied.”

In an affidavit in reply, Sir *C. Reed*, the chairman of the Board, said:—

“If the £90 a year in the pleadings mentioned is paid to the Plaintiffs, it has always been, and is, intended by the Plaintiffs, not to allow it to go into the general funds of the Plaintiffs, but to apply it for the benefit of the *Flint Street School* in particular.

“On the 16th of January, 1878, the following resolution was passed at a meeting of the Plaintiffs in the manner required by law, viz.:—‘That the School Board will apply the sum of £90 a year when received from the *Elephant and Castle Charity Estates* and the *King and Queen Charity Estate*, in connection with the education of children attending their school in *Flint Street, Walworth (Lambeth)*, until other application thereof shall be directed by lawful authority.’

“Some years ago the Plaintiffs were advised by counsel that by

virtue of an arrangement for transfer made under the 23rd section of the *Elementary Education Act*, 1870, any endowment transferred to the Plaintiffs must not be allowed to go into the general funds of the Plaintiffs, but must be applied for the benefit of the said particular school to which the endowment had previously to such transfer belonged.

“By means of such application as aforesaid, the poor inhabitants of the parish of *St. Mary, Newington*, will derive large benefit from the said sum of £90 a year. Their position will not be practically or at all the same as if no such payment were made. On the contrary, they will, by reason of such payment and such application thereof as aforesaid, be in a very different position from that of the poor inhabitants of neighbouring parishes.

“Their position will also be much more favourable than it was before the Plaintiffs were constituted, inasmuch as they will have the special benefit hereinbefore mentioned in addition to the ordinary benefits of one of the Plaintiffs’ schools (which are at least equal in merit and efficiency to the *Flint Street* School previous to its transfer to the Plaintiffs), and to the relief from the competition of the inhabitants of other parishes afforded by the establishment of other schools by the Plaintiffs.

In cross-examination on the above affidavit, Sir *C. Reed* stated, in substance, that the special advantages which would probably be conferred on the school would be the giving of prizes—the enabling some of the scholars to remain longer at the school, and have the opportunity of advanced study—and the foundation of scholarships in connection with the school, to enable the children to go to middle-class schools.

Hemming, Q.C., and *Romer*, for the Plaintiffs:—

By the 23rd section of the *Elementary Education Act* (33 & 34 Vict. c. 75) power is given to managers, under certain conditions, all of which have been complied with in this instance, to transfer to the School Board any particular school, together with its endowments. What is contemplated by the statute is, that the school and its endowments should be transferred by one operation as part of one arrangement. The School Boards are not bound to take transfers of schools, and in order to validate a transfer there

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must be the consent of the managers, the School Board, the Educational Department, and the subscribers. Whenever the School Board accept a transfer, they do so on the terms of the arrangement proposed. In this instance the arrangement was that they should take over the burden of maintaining the school, and out of the endowment keep down, so far as it would go, the expenses of the school. The £90 a year was not sufficient before to keep down the expenses without voluntary subscriptions.

The character of the school has not been altered, except that its efficiency is probably increased. It is as much a local school as before, and more so, because under the School Board system more of the children at this school come from the district.

Supposing even that the £90 goes into the general fund of the School Board, the parish is still a gainer; for whilst the efficiency is increased, that excess over the £90 which was formerly paid by the local subscribers is now thrown upon the general rates.

The *Education Act* says that where there is a deficiency of education the School Board must supply it; but it does not say that the School Board is bound to take over the burdens of an existing school without its emoluments, or, indeed, to take over any school whatever.

The question turns wholly upon the language of the 4th clause of the scheme, behind which the Court will not go. The original objects of this charity may have been doles for the relief of the poor; but the Court of Chancery, in the exercise of its plenary jurisdiction, has altered that, and by its scheme declared that this endowment shall be devoted to education. With the suggestion, then, that by the new arrangement the poor of the parish will not be benefited, it is really not within the province of the Court to deal upon this application.

Sir *H. Jackson*, Q.C., and *Maidlow*, for the Defendants:—

The issue raised is of importance, because this is the first endowment which is known to us to have been handed over to the School Board.

The School Board are not entitled to this endowment. We agree that the Court cannot go behind the scheme, and for that very reason the Court has no jurisdiction in this proceeding, and

in the absence of the Attorney-General, to try whether the proposed destination of the £90 is proper or not. But we say that the Plaintiffs, although they are assignees by deed from our *cestuis que trust*, cannot compel us to make a transfer of this property to them.

According to the terms of the transfer the managers purport to assign only "so far as they lawfully can;" hence all question of surprise upon the School Board, or of misunderstanding, is out of the case. The School Board must be considered to have taken over the school, in the discharge of their public duty, irrespective of gain, and subject to all the liabilities attending the transfer. If they do not get this endowment, they cannot be heard to say that the consideration for which they took over the school has failed.

This endowment is not in itself alienable property; before the statute the managers could not have alienated it to any similarly constituted school. Then is this such an endowment within the 23rd section as the school managers are enabled to transfer against the will of the trustees, if they consider, as they do, that the purposes of the transfer are alien to the trust?

The scheme directs payment to be made to a particular school, on the ground that that school was a benefit to the poor of the neighbourhood. The Court may possibly to-morrow be asked to sanction, and may sanction, another scheme. That shews that this mere direction that the managers shall have £90 a year paid to them is not property of such a kind as the managers can lawfully alienate.

Moreover, the school has become "materially altered." It has become a school under Government inspection. From a school for boys it has been turned into a school for boys and girls. It is no longer connected with a particular society and with a particular religious, social, and political body.

The view put forward by the School Board has varied. At one time it was argued that the transferee who takes the onus ought also to have the benefit. That was found to be an argument in relief of the rates. Then it was put forward that the School Board will not have the benefit after all, because the £90 a year is to be applied to certain special purposes, for the benefit of the

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school. But that is a resolution which the board may rescind at any time. They are under no terms, and there is no undertaking on the subject which they can be compelled to fulfil. The proposed annuity to the retired schoolmaster is not within the purposes of the scheme, or of the charity on which the scheme was founded; and the special benefits proposed to be conferred on the school, whilst they are a departure from the terms and intent of the scheme, will be an inducement to the managers of other schools to transfer their property to the School Board.

Section 13 of the *Elementary Education Act* (1870) *Amendment Act*, 1873 (36 & 37 Vict. c. 86), which empowers school boards to accept gifts as trustees for educational purposes, provides that “nothing in this section shall enable a school board to be trustees for or accept any educational endowment, charity, or trust, the purposes of which are inconsistent with the principles on which the School Board are required by sect. 14 of the principal Act to conduct schools provided by them.” Sect. 14 of the principal Act provides that a board school is to be a “public elementary school.” Sir *Charles Reed’s* evidence goes to shew that the board are about to devote this endowment to the purposes of middle class education. This is a “material alteration,” and the Court will not sanction the transfer to the Plaintiffs of this endowment.

Judgment.

BACON, V.C.:—

This is said to be a case of very great importance. For anything I know, it may be. I have not to measure that or consider that, because in the eye of the law one case is just as important as another, and I decline to enter into any of the speculations which have been suggested in the course of the argument, my duty being to decide according to the legal rights of the parties litigant before me, and I must say that I never in my life saw a case in which the legal rights were more clearly established by statute and by evidence than that which I have now to deal with. The scheme is the law upon the subject—I cannot go behind the scheme. I cannot doubt that the scheme was right in itself, nor hesitate to say that all its provisions must by the law be recognised and carried into effect. The scheme is plainly this: There is a chargeable fund consisting of £90 a year, and the scheme directs

that that shall be for the expense of maintaining the *Flint Street* School, or any other school which shall be established in its stead; and the duty of the trustees is to pay that £90 a year to that school, or to the persons who have the management of that school. In the course of time it seems that there was some tangible property vested in the managers of the school, the school-house and other things. Then comes the *Elementary Education Act*. Now, before I mention that, before I part with the position of the trustees, I ought to observe this—it is not necessary to read over again the words—the trustees' duty is to pay for the maintenance of the *Walworth* School, or any other school which shall be established in its stead, provided the provisions there stated are complied with. There is a certain discretion vested in the trustees. The obligation may not in all cases be upon them to pay that £90 a year, for if the school shall be materially altered, or if any other circumstances should render it expedient—I am giving the largest construction to those words, “or other circumstances”—then the trustees in their discretion may apply that £90 a year for other similar educational purposes, and for no other purpose; no other purpose being suggested.

Then comes the *Elementary School Act*, the provisions of which were referred to, which are very clear and distinct, and which apply directly to this case. It is found by the managers of the school that it would be expedient that the *Walworth* School should be transferred to the management of the Government Board, the Elementary School Board, and accordingly the very request mentioned in the 23rd section is duly and punctually complied with. The conveyance is made, and the managers assign and transfer, as far as they have any legal power to do so, the £90 a year for the purposes of that school. Then the Act of Parliament, the clauses of which have been read—and I need not read them again—provides that when an arrangement is made under this section, the managers may, whether the legal interest in the school-house or endowment is vested in them or in some other person as trustee for them or the school, convey to the parish all such interest in the school-house and endowment as is vested in them or in such trustee, or in such similar interest as may be required. I cannot imagine words that could be suggested more clear and explicit, or more

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directly covering this particular case before me, for the £90 a year is vested in the trustees in trust for the school, payable by them to the managers of the school, and the managers have power to transfer that interest—that £90 a year which they are bound to receive—to the School Board. The Act of Parliament is literally in every respect complied with. It has been suggested in the course of the argument that it is possible there may be some misapplication by the existing School Board of this fund when they receive it, and Sir *Charles Reed* having been asked some questions in the box yesterday, in cross-examination upon his affidavit, said, that it was contemplated by the School Board to keep the £90 a year as a distinct fund, but, among other suggestions which were made, to apply it in giving prizes or encouragement to the pupils in the school. And Mr. *Maidlow* has argued thereupon that that is a clear proof which the Court ought to adopt and take as a matter of fact, that it is the intention of the School Board to misapply this fund—to make it a school for middle-class education, whereas, in point of fact, it is meant for elementary education. I cannot attend to that argument in the slightest degree. If the £90 a year had been paid, without any School Board existing at all, to the managers of the school, who can doubt that it would be within their power and discretion, carrying on this school, to apply the £90, or such part of it as they thought fit, to any wholesome, lawful, proper purpose connected with the management of the school—it being always an elementary school, for that is a fact to which I cannot allow any contradiction—it is proved by witnesses over and over again—it is not only proved with a general assertion that it is an elementary school, but there is the scheme of education, the hours of attending, the fees paid for the attendants, and that is put in evidence perhaps needlessly, but there it is plainly in evidence, and this is, a school for purposes of education—exactly the same as that school which existed before the *Elementary Education Act* was passed? I have listened to the arguments, which have been extremely speculative and ingenious, but I cannot find any reason why the plain words of the Act of Parliament should not be carried into effect—why that £90 a year which is to be paid to the *Walworth* School for the purposes of education should not be paid to the persons in whom

the task of conducting that school is now reposed, instead of the individuals who formed the managing board. It was suggested that, as hereafter at some time there may be some misapplication of these funds by the School Board, liberty ought to be reserved in the decree I am now asked to make for that purpose. It is said that the trustees might come with some new scheme. No doubt they might, that is to say, they might have done so. They had upon this record not only abundant opportunity, but even an invitation, to shew, if they could, any other purpose to which, in the exercise of their discretion, whatever that might be, they could apply any part of this fund. They have not suggested it, and there is not a particle of evidence on their part. There is a general suggestion that there are charitable purposes mentioned in the 11th section of the scheme to which this fund might be applied. My answer to that is that they could not be so lawfully applied, but they can only be applied to institutions for educational purposes. There is no reason in the world to doubt that the provisions have been carried out in the manner prescribed by the general statute, the policy and expediency of which it is not for anybody to question; and being satisfied, as I am, by the law and the Act of Parliament especially, that the managers who have the right to have this £90 a year are now the School Board, I cannot hesitate to make a declaration to that effect, and to order that the payment of this £90 a year be made to the Plaintiffs, who by law are entitled to receive it.

There will be a declaration in the terms of the prayer.

I am pleased and relieved by the statement that has been made to the Court, that the costs are arranged.

Solicitors: *Gedge, Kirby, & Millett; John Clutton.*

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April 8.

In re JARMAN'S ESTATE.LEAVERS *v.* CLAYTON.

[1876 J. 34.]

Charitable Legacies—Direction to Executors to apply Residue to Charitable or Benevolent Purpose.

411(81)/173 H
Testator, who died in October, 1875, after giving numerous charitable and pecuniary legacies, directed that his executors should apply to any charitable or benevolent purpose they might agree upon, and at any time, the residue of his personal property which by law might be applied to charitable purposes. The executors, in January, 1876, in writing, agreed that the residue should be paid to a charitable institution to which the testator had given a legacy:—

Held, that the direction to the executors was indefinite and inoperative; that the gift failed; and that the next of kin were entitled.

Statement.

WILLIAM JARMAN, of *Nottingham*, who died on the 17th of October, 1875, by his will, dated the 23rd of August, 1873, after appointing two executors—the Plaintiffs—gave his moneys and securities for moneys, stocks, and furniture, and all his estates, both real and personal, not therein disposed of, unto them, their heirs, executors, &c., in trust to convert the same into money in such manner as they should think fit, to pay thereout his debts, funeral and testamentary expenses and legacies, and sums which he thereby bequeathed and gave to the persons and societies thereafter named. The testator gave unto the treasurer for the time being of a society who called themselves the Governors of the General Hospital near *Nottingham*, £1000 to be applied to the use of that charitable institution, and then gave to eight other charitable institutions or societies, described, and to eleven persons, named, legacies of various amounts, duty free, and said: “I direct that my executors shall apply to any charitable or benevolent purpose they may agree upon, and at any time, the residue of my personal property which by law may be applied to charitable purposes remaining after the payment of the legacies to charities named in my will, and after the payment of the legacies to friends named in my will, which not having been paid out of my personal property, and the proceeds of the sale of any real property which

by law may not be applied to charitable purposes, and which I direct shall be the primary fund for payment of any non-charitable legacies."

By a codicil dated the 11th of June, 1875, the testator gave an additional £1000 to the Governors of the General Hospital near *Nottingham*, to be applied to the use of that charitable institution, and also gave other additional and further legacies to the hospital and the persons named.

The testator was entitled to personal estate of considerable amount, comprising both pure and impure ; and real estate which had realized the sum of £3250.

The executors, pursuant to the direction in the will in that behalf contained, by a writing under their hands dated the 14th day of January, 1876, agreed and declared that the residue of the testator's personal property which by law might be applied to charitable purposes should be paid to the treasurer for the time being of the General Hospital near *Nottingham*, to be applied to the charitable purposes of that institution.

The Defendant, as one of the next of kin of the testator, having claimed that the residuary personal estate so far as it consisted of impure personalty was undisposed of, and disputed the validity of the trust and direction in the will contained as to the residuary personal estate generally, and claimed that the whole of it, both pure and impure, was undisposed of, and ought to be divided amongst the next of kin, the executors brought this action to have the property administered, and the trusts carried into effect by and under the direction of the Court, and for consequential relief.

Robinson, Q.C., and *Fellows*, for the Plaintiffs, stated the facts of the case.

Eddis, Q.C., and *Freeling*, for the Governors of the General Hospital :—

The next of kin will probably contend that this direction to the executors is void for uncertainty, but the answer to any such contention would be that the words are clear and positive: the executors shall apply the residue to any charitable or benevolent purpose that they may agree upon ; and they have agreed to apply the whole to this hospital, which is a charitable institution. The

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executors had power to apply the residue to the one or the other of the two purposes mentioned, and it is submitted that in a case where there are several purposes, and one of them is lawful and the other unlawful, the executors could properly apply the residue to the lawful purpose, and therefore the hospital is entitled to the fund after the payment of debts and legacy duty. This has been the law from the time of Lord *Hardwicke* downwards: *Grimmett v. Grimmett* (1); *Sorresby v. Hollins* (2); *Lewis v. Allenby* (3); *University of London v. Yarrow* (4); *Wilkinson v. Barber* (5).

Cozens-Hardy, for the *Nottingham Eye Dispensary*.

Dickinson, Q.C., and *V. R. Smith*, for next of kin and the heir-at-law:—

There has been no disposition by the testator of the residue of his estate which the Court can attend or give effect to. The only disposition of it is in the direction to the executors to apply it, and that is not an effectual gift. It is a direction to the executors to apply it as they may agree upon at any time to any charitable or benevolent purpose; and that is a trust not executed, but to all intents and purposes executory. The question is, has there been a gift of anything to any donee? It is submitted that there is great uncertainty as to what the executors were to do, and the cases which have been cited in reference to the direction being lawful or unlawful do not bear upon that point. The decisions in *Morice v. Bishop of Durham* (6), *Ellis v. Selby* (7), *Williams v. Kershaw* (8), and *James v. Allen* (9), shew that this is not a good trust for charity, inasmuch as it cannot be stated how much there is for either purpose. The direction is not sufficiently certain or defined to enable the Court to give effect to it. Is not this a trust which would authorize the executors to give a portion of the funds otherwise than to a charitable purpose? Can the Court say now, after the decisions expressed in the cases referred to, that a benevolent purpose is not something otherwise than charitable? The Court has to consider what the benevolent purpose is to be;

(1) Amb. 210.

(6) 10 Ves. 536.

(2) 9 Mod. 221.

(7) 7 Sim. 352; 1 My. & Cr. 286,

(3) Law Rep. 10 Eq. 663.

299.

(4) 1 De G. & J. 72.

(8) 5 Cl. & F. 111.

(5) Law Rep. 14 Eq. 96, 98.

(9) 3 Mer. 17.

that it cannot do. The gift is to charitable and other purposes. The two cannot be separated, but must be taken as a whole, and as the Court cannot determine what the purposes are to be, there is no disposition of the pure personal residuary estate, and therefore the next of kin are entitled.

Hastings, Q.C., and *Hollis*, and *D. Jones*, for other next of kin in the same interest.

[The case of *Kendall v. Granger* (1) was referred to.]

Eddis, in reply.

HALL, V.C. :—

Whether or not the distinction which has been contended for between the present case and *Ellis v. Selby* (2) and the other cases referred to, particularly the case of *Williams v. Kershaw* (3), which was before Lord *Cottenham*, be a sound one, or even a satisfactory one, I do not mean to say ; nor whether it might be better to adopt the view suggested by Mr. *Eddis*, that if there be one purpose which can be lawfully executed it should be done ; but I am of opinion that I am bound by the decisions in *Ellis v. Selby* and the other cases cited, and that I must hold that in this case the direction has reference to a gift—a trust which the Court cannot execute. It could not execute it at the date of the death of the testator, nor if the executors had not thought fit to exercise the discretion which was vested in them. The observations in the cases shew that the test is this : that the Court is not to wait and see whether the executors will appoint to charitable objects or not, but to look at the will as at the date of the death of the testator, and at once say whether the gift is definite or indefinite, and if the latter, that it is inoperative. That is the case here, and I hold that the gift of the residue fails, and that it belongs to the next of kin. The decree will be virtually the same as in *Williams v. Kershaw*.

Solicitors : *Field & Co.* ; *Taylor & Hales* ; *F. & T. Smith & Sons* ; *Field, Roscoe, & Co.*, agents for *R. Enfield, Nottingham*.

(1) 5 Beav. 300.

(2) 7 Sim. 352 ; 1 My. & Cr. 286, 299.

(3) 5 Cl. & F. 111.

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[1877 B. 375.]

April 9.*Vendor and Purchaser—Contract—Rescission Clause—Absence of Title in Vendor.*

A condition in a contract for sale that, if the purchaser shall make any objection or requisition which the vendor shall be unwilling on the ground of expense or otherwise to comply with, the vendor may annul the sale, does not enable a vendor to rescind the contract in a case where he fails to shew any title whatever.

Statement.

BY an agreement in writing dated the 13th of February, 1877, the Defendants agreed to sell and the Plaintiff to purchase the inheritance in fee simple, free from incumbrances, of a piece of land at *Camberwell* for £155, whereof £10 was paid on the signing of the agreement, and the balance was to be paid on the 28th of February, which was the day fixed for the completion of the purchase. The agreement contained the following clause:—

“10. If the purchaser shall make any objection or requisition in respect of the title, or of any other matter or thing whatsoever which the vendors shall be unwilling on the ground of expense or otherwise to comply with, they shall be at liberty, notwithstanding any intermediate negotiation in respect of such requisition or objection, to annul the sale, and thereupon the said contract, and all matters and things therein contained, shall be at an end, and the purchaser shall receive back his deposit, but without any costs, interest, or compensation.”

Requisitions were delivered on the 2nd of March, and answered on the 5th of March. Early in the month of April the conveyance was prepared and engrossed, but before it was executed it was discovered that instead of having been seised in fee of the property at the date of the contract, the Defendants were then only entitled thereto for the residue of a long term of years at a peppercorn rent, which expired on the 25th of March, 1877, shortly after which day the persons entitled to the reversion entered and took possession.

When the Plaintiff ascertained that this was the case, he objected that the Defendants could not make a title. Some fruitless negotiations ensued, and ultimately, on the 14th of July, 1877, the vendors gave the purchaser notice that they annulled the sale under the clause in the contract above set out, at the same time tendering him his deposit, which he refused to accept.

The purchaser then brought this action against the vendors, and claimed specific performance of the agreement; or, in the alternative, for the return of the deposit, and damages for breach of the agreement.

Hastings, Q.C., and *Boome*, for the Plaintiff:—

A condition of this character does not enable a vendor to rescind in a case where he has failed to shew any title whatever: *Duddell v. Simpson* (1); *Dart's Vendors and Purchasers* (2). The Plaintiff has incurred expense in the investigation of the title and otherwise, and is entitled to damages from the Defendants.

W. Pearson, Q.C., and *Methold*, for the Defendants:—

The condition applies. The contract was well rescinded by the notice of the 14th of July, and all the purchaser is entitled to is the return of his deposit, which was duly tendered him; so this action ought to be dismissed with costs.

HALL, V.C.:—

It seems to me that the Plaintiff is entitled to judgment for such damages as he may have been put to in respect of the non-performance of this contract by the Defendants. It is said that the Defendants in this case have availed themselves of the 18th condition of sale, and that they have thereunder put an end to the agreement, and that their having done so operates as a bar to this action. [His Lordship then referred to the facts of the case, and continued:—]

The 10th condition itself does not appear to me to apply to the present case. It is this: "If the purchaser shall make any objection or requisition in respect of the title, or of any other matter or thing whatsoever which the vendors shall be unwilling on the

(1) Law Rep. 2 Ch. 102.

(2) 5th Ed. p. 158.

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ground of expense or otherwise to comply with," then the vendors should be at liberty to annul the sale.

I hold that such a condition does not apply to a case where the vendor has not any title at all. The words "unwilling on the ground of expense or otherwise to comply with" do not apply to a case where there has been an objection or requisition on the part of the purchaser in effect saying that the vendor has no title, and that the property belongs to someone else. The purchaser says in effect: "I do not make an objection or requisition in respect of anything which you may cure. I don't require you to remove the objection or requisition by purchasing the interest of the freeholder which you have contracted to sell and to which you have shewn no title." *Non constat* that the freeholder would be willing to sell. The matter is not one capable of being complied with as between vendor and purchaser, and it is not, in my judgment, that which was within the contemplation of the parties when this clause was framed.

Further, it appears to me that even if it were such an objection as could be held to be within the clause, the course taken was not the right one. The matter went on so long after the time when the vendors' solicitors knew the real position of the case with reference to the title, without any steps being taken, that I hold they waived the right of rescission under this clause.

His Lordship then gave judgment for the Plaintiff, directing an inquiry as to damages.

Solicitors for Plaintiff: *John Attenborough & Co.*

Solicitors for Defendants: *Blachford, Riches, Kilsby, & Wood.*

LEWIS v. NOBBS.

[1877 L. 214.]

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May 9.

Will—Direction to Trustees to invest—Russian Railway and Egyptian Bonds—Trust Securities passing by Delivery—Defalcation—Liability of Trustees—Next Friend a Defendant—Rules of Court, 1875, Order XVI., r. 8.

A testator by will gave all his residue to trustees upon trust to invest in the parliamentary stocks or funds, or upon real securities; and the will contained a proviso that as often as the trustees should think it expedient so to do, they might sell out, transfer, or otherwise vary any of the trust moneys, funds, and securities, and invest the same in or on any other funds or securities whatsoever:—

Held, that the sale of New £3 per Cent. Annuities and the investment of the proceeds in Russian railway and Egyptian bonds was authorized, and not a breach of trust.

Each of two trustees retained possession of a moiety of bonds held in trust, and which passed by delivery, and one trustee committed a breach of trust:—

Held, that the other trustee was liable to make good the loss sustained.

The name of a Defendant, who was also the next friend of the Plaintiffs, and whose wife was a Defendant, was struck out, and liberty was given to the wife to defend separately.

THE Plaintiffs were *J. A. Lewis* and his brother and sister, infants, by *C. H. Gaunt*, their stepfather and next friend; and the Defendants were two trustees, and, by amendment, the said *C. H. Gaunt* and his wife (the Plaintiffs' mother) and her eldest son.

Statement.

A. C. Macnin, who died many years ago, by his will, made in October, 1838, after bequeathing certain legacies, gave all the residue of his estate and effects to two trustees, named, their heirs, executors, &c., upon trust, to sell and convert into money and invest the same in the parliamentary stocks or funds, or upon real securities at interest, in their names, and upon trust to divide such trust funds, securities, and premises as therein mentioned. By a codicil made in 1839 the testator directed that the share of his daughter (the Plaintiffs' mother) should be held by the trustees upon trust to pay the income to her for life for her sole and separate use, without power of anticipation, and after her death to divide the share amongst her children equally.

The will contained the following clause:—Provided always

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—

that it should be lawful for the trustees and the survivor of them, and the executors and administrators of such survivor, and their, his, or her assigns, and other the trustees or trustee, or only acting trustees or trustee for the time being of the will in whom or in whose names or name any stocks, funds, securities, or trust moneys "shall be vested from time to time and as often as they shall think it expedient so to do, to sell out, transfer, or otherwise vary or alter all or any of the said trust moneys, funds, and securities, and invest the same or any part thereof in or on any other funds or securities whatsoever, but so that the same trust moneys and premises when so varied or altered should be held upon and for the same trusts." The trustees originally appointed possessed themselves of the estate of the testator, and after satisfying all his debts divided the residue and invested the share of his daughter and her children in the purchase of the sum of £3171 17s. 10d. New £3 per Cent. Annuities. The daughter's husband (the Plaintiffs' father) died in August, 1873, and she, in September, 1876, intermarried with *C. H. Gaunt*.

In October, 1874, the Defendants *Nobbs* and *Gresham* were appointed new trustees, and the above-mentioned sum of annuities was transferred into their names. On the 30th of October, 1874, they sold out the annuities, and invested the proceeds in the purchase of 2600 Russian railway bonds, and forty Egyptian bonds, and they, at the request of his mother, the Defendant *Mrs. Gaunt*, lent £250 to the Defendant *E. J. Lewis* on his personal security. The trustees agreed that each should hold one half of the Russian railway bonds which were transferable by delivery. The Defendant *Thomas Gresham* was a solicitor, and in November, 1876, he became insolvent, and afterwards absconded, and it was alleged that he had disposed of the bonds which were in his possession, and applied the proceeds to his own use. The Defendant *Nobbs* placed the bonds which were left in his possession at his bankers, where they had ever since remained, and he had regularly paid the income to the Defendant *Mrs. Gaunt*. The bonds had become reduced in value. It was charged that there was no power authorizing the trustees to invest the trust funds in such securities, and that what they had done was a breach of trust, and the Plaintiffs claimed a declaration that the trustees were jointly and severally liable to make good

the whole of the trust funds, and that, if necessary, there might be administration by the Court of the trusts; and costs. It appeared that the Defendant Mrs. *Gaunt* had had pecuniary and business transactions with both the Defendants, the trustees, and that she was still a debtor in regard to them.

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Upon an objection being taken on behalf of the Defendant *Nobbs* that *C. H. Gaunt*, who had been made a Defendant, was not a proper next friend, the Vice-Chancellor, after being referred to *Anonymous Case* (1), *Payne v. Little* (2), and Rules of Court, 1875, Order XVI., rule 8, said that the proper course to pursue would be to strike out the name of *C. H. Gaunt* as a Defendant, and give his wife liberty to defend separately.

The name was accordingly struck out.

W. Pearson, Q.C., and *C. C. Berkeley*, for the Plaintiffs:—

Argument.

The investment in Russian railway bonds and Egyptian bonds was unauthorized and a breach of trust, and the trustees are jointly and severally liable to make good the same sum of annuities or the sum which they realized. Even if the new investment was authorized, the trustees were not entitled to lend the £250 to any one on his promissory note or bill of exchange, that being merely an engagement to pay, and not a security, and the trustees are liable to make good that sum. A trustee is not justified in entrusting a co-trustee with possession of trust funds, and thus enabling him to dispose of them for his own benefit; therefore, as the Defendant *Nobbs* left a moiety of the bonds in the hands of his co-trustee, instead of their being kept under the joint control of the trustees, he is liable for the defalcation which has been committed: *Mendes v. Guedalla* (3). When the breach of trust was committed the bonds were of a higher value, and the Plaintiffs are entitled to have that value realized or made good, so that they shall not suffer any loss: *Stretton v. Ashmall* (4).

Dickinson, Q.C., and *D. L. Alexander*, for the Defendant *Nobbs*:—

There was no fraudulent breach of trust on the part of this

(1) 11 Jur. 258.

(2) 13 Peav. 114.

(3) 2 J. & H. 259.

(4) 3 Drew. 9.

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 Argument.  
 ———

Defendant. He has acted in good faith and with reasonable caution, and with the approval and concurrence of the Plaintiff's mother, the tenant for life of the trust funds. He believed that his co-trustee was an honourable man up to the time when he absconded, and he has at various times assisted the Plaintiff's mother in her distress. The investment in the bonds was fully authorized, and therefore in that respect there was no breach of trust. The loan to the son was upon the security of a policy of insurance on his life, and a charge upon his reversionary interest; and if that should be held to be not a good security, then the son should be ordered to pay the money into Court at once; at any rate, there ought to be a declaration that as between him and the trustees he is primarily liable, and there ought to be an inquiry as to what interest has been and to whom paid, and the extra income derived by the mother from this loan ought to be applied in making good the principal which might not be paid by the son, the loan having been made at the request of the mother when she was discoverd. The investment in the bonds being a proper one, the utmost the Defendant *Nobbs* is answerable for are the bonds which he retained possession of, and those he will produce. He ought not to be held liable for any loss which may have resulted through the conduct of his co-trustee. Subject to the moiety of the bonds being restored, the Defendant *Nobbs* will be entitled to his costs as between solicitor and client, and all expenses properly incurred as trustee.

*C. C. Berkeley* appeared for the other Defendants, excepting *Thomas Gresham*.

Judgment.  
 ———

HALL, V.C. :—

I am of opinion that the trustees were authorized by the proviso in the will to invest the trust funds in the bonds; but though a proper investment, I think that the Defendant *Nobbs* did not discharge his duty in allowing his co-trustee to retain possession of one half of the bonds, and the course pursued enabled the co-trustee to improperly deal with them. The duty of the trustees was to make an investment in the names of both, so that the bonds should not be transferable without the action of both, or,



as the bonds were transferable by delivery, care should have been taken that there could not be any improper disposition of them. The arrangement made by the Defendant *Nobbs* being improper, he is liable for the illegal dealing with the moiety of the bonds of his co-trustee.

There must be a declaration of the Defendant *Nobbs*' liability, and an inquiry as to when and how and under what circumstances the bonds were sold by *Thomas Gresham*, and what was the market value at the time, and what sum was realized, and what became of it; and if these facts cannot be ascertained, or what were the proceeds which came to the hands of *Gresham*, then the liability will extend to the value of the bonds at the time when they were placed in *Gresham*'s hands in October, 1874.

As to the loan to the son, I think that the security taken by the trustees was not warranted. It was a breach of trust, and there must be a declaration that the trustees are jointly and severally liable to pay that money; and also a declaration that the son is also liable to pay it, and that, as between him and the trustees, he is primarily liable to do so; and I shall order that the money be paid within six months by either the son or the trustees.

Though the Defendant *Nobbs* has committed a breach of trust, I consider that a personal imputation ought not to have been made against him. That was not necessary to the Plaintiffs' case; therefore as regards him I shall make no order as to costs, he will have neither to pay nor receive any, but there must be an order for the payment of costs against the Defendant *Thomas Gresham*.

Solicitors: *Comyns R. Berkeley; Lewis & Sons.*

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—

C. J. B.

*In re* CRAYCRAFT. *Ex parte* BROWNING.

1878

April 1.

*Fi. fa.*—Seizure without Sale—Subsequent Liquidation—Costs of Possession and of preparing for Sale—Payment by Trustee—Bankruptcy Act, 1869, s. 87.

A sheriff's officer seized the goods of a trader debtor under a *fi. fa.* for more than £50, and advertised them for sale. Before the sale could take place the debtor filed a petition for liquidation, and the trustee obtained an injunction restraining the sale, and possession was then given up. Upon the application of the sheriff for his expenses:—

*Held*, that the facts of there having been no sale, and the liquidation of the debtor, did not affect the right of the sheriff to be paid by the trustee the necessary expenses of possession and of preparing for sale.

Statement.

THIS was an appeal from an order of the Registrar of the Canterbury County Court, sitting as Judge.

The *Bowers Allerton Colliery Company, Limited*, recovered judgment in the Common Pleas Division against the debtor, *William Craycraft*, a trader; and a writ of *fi. fa.* for a sum exceeding £50 was issued. Under this writ, on the 23rd of January, 1878, *Alfred Evans Smith*, one of the officers of the sheriff of the county of Kent, seized *Craycraft's* goods, and proceeded in the usual way to prepare and announce them for sale.

On the 25th of January *W. Craycraft* filed his petition for liquidation in the Canterbury County Court.

On the 27th *Thomas Browning* was appointed receiver, and the sheriff's officer was restrained from taking any further proceedings under the *fi. fa.* until after the 11th of February.

On the 12th of February the sheriff's officer was served with a final injunction restraining the *Bowers Allerton Colliery Company* from taking any further proceedings upon their judgment. Upon this the sheriff's officer withdrew from possession of the debtor's goods and effects, and subsequently applied to *Thomas Browning*, the trustee, for payment of a sum of £7 18s. for his expenses.

On the trustee declining to pay, application was made to the County Court, when the Registrar, sitting as Judge, made an order, dated the 1st of March, 1878, by which he directed that the expenses incurred by the sheriff's officer in taking and keeping possession of the goods of the debtor, and also the expenses of

preparing for the sale, should be paid by the trustee out of the assets in his hands, with costs.

From this order the trustee appealed.

*E. Cooper Willis*, for the Appellant :—

The Court has no power to make an order against the trustee for payment of these expenses at the instance of the sheriff. There is no privity between the sheriff and the trustee. The execution creditors who put the sheriff in possession are the proper persons to pay these costs. There has been no sale, and therefore he is not entitled as against the trustee to these expenses. Sect. 87 of the *Bankruptcy Act*, 1869, is only applicable where goods have been sold, in which case the sheriff may deduct his expenses.

*Creed*, for the Respondent, was not called on.

BACON, C.J. :—

The case is quite clear. The sheriff's officer, an officer of the law, is called upon to execute a *fi. fa.*; he does so, and in the discharge of his duty he incurs certain necessary expenses, which are therefore expenses properly incurred. Before, however, the sale could take place the liquidation happens and the sheriff is restrained from selling.

Now, although the *Bankruptcy Act*, 1869, s. 87, provides, that where the goods are sold by the sheriff, upon due notice being given after the sale of an act of bankruptcy committed by the debtor, he is to hold the proceeds, "after deducting expenses," for the trustee, it does not in the least deprive the sheriff's officer of his right to be paid all expenses properly incurred if there has been no sale, as in the present instance. Nor can the fact that the debtor's property after the seizure by the sheriff became by the operation of the bankruptcy laws vested in a trustee alter the rights of the sheriff's officer to have the expenses of possession and preparing for sale repaid out of the debtor's estate. I am, therefore, of opinion that the order appealed from is quite right, and the appeal must be dismissed with costs.

Solicitors: *F. Venn & Son*, agents for *J. M. Edwards & Son*, Ramsgate; *C. J. Mercer*, Ramsgate.

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*In re*

CRAYCRAFT.

*Ex parte*  
BROWNING.

Argument.

Judgment.

C. J. B.

1878

April 1.

*In re* FOSTER. *Ex parte* DICKENS.*Charges and Expenses of Country Solicitor attending an Appeal in London—  
London Agent—Taxation.*

A country solicitor personally attending an appeal instead of employing his *London* agent, will, on taxation, be allowed the additional charges and expenses thereby occasioned.

IN taxing the costs of an appeal to the Chief Judge the Taxing Master had allowed two items of £14 each for the charges and expenses of the Respondent's country solicitor, who had personally attended the appeal in *London*. Upon an application by the Appellant's solicitors that the Taxing Master might be at liberty to review his taxation upon these points, on the ground that this additional expense might have been avoided had he employed his *London* agent in the usual way,

BACON, C.J., held that the country solicitor was justified in personally attending the appeal, as he was probably better acquainted with the subject-matter than the *London* agent, and that on this principle the allowance was right; that the amount was a mere matter of discretion which could not now be questioned.

Solicitors: *Field, Roscoe, & Co.*; *Layton & Jaques*.



*In re* ALBEZETTE. *Ex parte* SMITH.

C. J. B.

*Shorthand Writer appointed by Judge—Costs of Transcript included in Costs of Hearing—Discretion—Bankruptcy Rules, 1870, rr. 188, 207.*

1878  
April 1.

The costs of the transcript of a shorthand writer's notes of evidence are, like other costs, in the discretion of the Judge within rule 188 of the Bankruptcy Rules, 1870, notwithstanding the provisions with reference to these costs made by rule 207.

THIS was an appeal from so much of an order of the Judge of the *Bradford* County Court as included in the costs of a motion the costs of a shorthand writer's notes of the evidence, which was voluminous, and of the transcript thereof.

Statement.  
      

At the hearing of a motion against *W. Smith*, a creditor, by the official trustee, and one *Samuel Shackleton*, at the *Bradford* County Court, the Judge appointed a shorthand writer to take down the evidence of the bankrupt and the other witnesses examined at the hearing.

After a hearing of three days in duration, the Judge, on the 26th of February, ordered payment by *W. Smith* of the sum claimed and the costs of the motion, including the costs of the shorthand writer's notes of evidence and the transcript.

This order was not served upon *Smith* until the 16th of March, and on the 19th of March an *ex parte* application was made by *Smith* to the County Court Judge either to rehear the matter on the subject of the costs in question, or to enlarge the time for appealing. The County Court Judge thereupon enlarged for seven days the time of appealing against so much only of the order as related to the payment of the costs of the shorthand writer.

*Creed*, for the Appellant:—

Argument.  
      

Under the rules the Judge had no power to order *Smith* to pay the costs of this shorthand writer; he was not appointed at the instance of *Smith*, or at that of his solicitor, and rule 207 of the *Bankruptcy Rules*, 1870, provides that "such sums shall be paid by the party at whose instance the appointment was made, or out of the estate."

C. J. B. *Morton Smith* (for *Horne Payne*), for the Respondent :—

1878

*In re*

ALBEZETTE.

*Ex parte*

SMITH.

Argument.

The costs of this shorthand writer are costs in the cause, and therefore, under rule 188, are in the discretion of the Court. The case is not within rule 207 at all. The shorthand writer was appointed by the Judge in the exercise of his discretion to shorten the proceedings, and the expense of the hearing has been materially lessened by his employment. The appeal, too, is out of time, as the Judge had no power to enlarge the order.

*Creed*, in reply :—

The appeal is not out of time. The County Court Judge might have granted a rehearing, or he might have directed that the order which he had made should be dated as of the 19th of March; he had therefore the power to extend the time for appealing from the order.

Judgment.

BACON, C.J., after intimating that the objection as to time, if it had been insisted upon by way of preliminary objection, would have been fatal, as the Judge had no power to enlarge the time for appeal, continued :—

If the Judge in the Court below, in the exercise of his discretion, thought fit to appoint a shorthand writer to take down the evidence and so shorten the duration of the trial, and to include his costs and the costs of the transcript in the costs of the hearing, he had full power to do so. The 188th rule applies to costs of this kind, as well as the 207th to the particular costs there specified. By the former rule all costs are in the discretion of the Judge, and the 207th rule does not take away that discretion. In my opinion the rules fully justify the order made in the Court below. The appeal must be dismissed with costs.

Solicitors: *G. B. Wheeler*, agent for *Robinson & Robinson, Keighley*; *William Paget, Skipton*.

*In re* BLANSARD. *Ex parte* HATTERSLEY.

*Liquidation—Order and Disposition—Three Years' System of Hire—Custom—  
Bankruptcy Act, 1869, s. 15, sub-s. 5.*

C. J. B.

1878

May 13.

Four months previously to his bankruptcy the debtor hired a piano from *H. & Co.* upon the following written terms: £15 a year for three years by equal monthly payments of 25s.; at the expiration of which term the piano became the absolute property of the hirer; but in case the instalments were not paid, or in the event of the death, bankruptcy, or insolvency of the hirer before the expiration of the term, *H. & Co.* were to be at liberty to determine the hiring and take possession of the instrument. There was no special mark or label on the piano to shew that it was not the property of the debtor. Upon the bankruptcy, *H. & Co.* removed the piano from the debtor's premises. The trustee claimed the piano as being within the order and disposition of the debtor. There was evidence of a custom of letting pianos on such terms:—

*Held*, that the custom was sufficiently established, and one which the ordinary creditors of a bankrupt must be reasonably presumed to have known, and accordingly that the agreement for hire was, on the principle of *Ex parte Powell* (1), valid, and did not come within the mischief contemplated by the *Bankruptcy Act*, 1869, s. 15, sub-s. 5.

THIS was an appeal from an order of the *Sheffield* County Court. *T. N. Blanshard*, the debtor, a beerhouse keeper carrying on business at *Sheffield*, took from the Appellants, Messrs. *W. Hattersley & Co.*, pianoforte dealers, *Sheffield*, a piano of the value of £45 on the system known as the "three years' system." The terms of this hiring were specified in an agreement dated the 21st of August, 1877 (which was stamped with a 6d. agreement stamp), and were as follows:—

"Received from Mr. *William Hattersley* a walnut piano on hire at £15 per year, payable by equal monthly instalments, the first payment to be made on the 21st day of August, 1877. And I the undersigned *N. Blanshard* undertake not to remove the said instrument from 61, *West Street*, without the previous consent in writing of the said *William Hattersley*, and also to keep the same in proper order and condition. And it is agreed that in case default is made in payment of the said instalments, or any of them,

Statement.

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 Statement.

or in the event of the said *N. Blanshard* dying or becoming bankrupt, or insolvent, or of any valid execution being issued against him, or his effects, or of his making an assignment of his effects, then the said *William Hattersley* shall be at liberty at once to determine and put an end to the said hiring, and to take possession of the said instrument, and that in case he does so during the currency of a month the said *N. Blanshard* shall pay to him a proportion out of the sum payable for such month.

(Signed) “*N. Blanshard.*”

“Memorandum that if the said *N. Blanshard* shall continue to pay the said sums regularly until the same shall amount to £45, the said *William Hattersley* will thereupon (in consideration of such payment) assign and relinquish all his right in the said instrument in favour of the said *N. Blanshard*, and the same shall thereupon become his, but until such payment in full, the said *N. Blanshard* shall have no property whatever in the said instrument, otherwise than as the hirer thereof only.”

(Signed) “*W. Hattersley.*”

There was also a card left with the instrument, upon which was, “Purchase price £39 15s. Hiring price £45.”

The first instalment was paid. The piano had the maker's name, *W. Hattersley & Co.*, upon it in the usual way, but otherwise there was no special label or mark affixed to shew that it was not the property of the debtor.

On the 11th of December, 1877, the debtor filed his petition for liquidation, and on the 12th of December a receiver and manager of the debtor's estate was appointed.

On the 17th of December Messrs. *Hattersley* removed the piano to their own warehouse, three instalments for hire being due to them at this time. The trustee claimed the piano on behalf of the creditors as being within the order and disposition of the debtor; Messrs. *Hattersley*, however, refused to deliver up possession, and upon the trustee's application, the Judge of the *Sheffield* County Court, considering that the agreement for hire was in its terms an evasion of the bankruptcy law, directed Messrs. *Hattersley* to deliver up the instrument to the trustee. From this order Messrs. *Hattersley* appealed.

The question was whether the custom of hiring pianos on the "three years' system" was sufficiently established to prevent the operation of the order and disposition clause, *Bankruptcy Act*, 1869, s. 15, sub-s. 5. There was evidence from numerous pianoforte dealers and makers from different parts of the country to the effect that "the three years' system" was a custom well known to the mercantile world and the public generally. Since this order the trustee had disappeared, but the committee of inspection had instructed counsel to appear in support of the order of the County Court Judge.

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1878

In re

BLANSHARD.

Ex parte

HATTERSLEY.

Statement.

Winslow, Q.C., and *R. T. Reid*, for the Appellants:—

Argument.

The evidence as to the custom of letting out pianos on the hire-purchase system is clear and uncontradicted, and proves that the custom is universally known and practised, and that it is one which the ordinary creditors of the debtor may be reasonably presumed to have known: *Ex parte Powell* (1); and the evidence of custom is stronger in the present case than it was there. When such a custom is sufficiently proved, reputed ownership is excluded. *Ex parte Watkins* (2); *Ex parte Vaux* (3); *Ex parte Stooke* (4). This is not a case of a man making a custom for himself, as in *In re Hill* (5), where the decision would have been against the trustee, had the custom been satisfactorily established.

The custom of hiring pianos on the terms of the agreement between the debtor and Messrs. *Hattersley* is quite usual, and is not denied, and is no evasion of the bankruptcy law; by its terms the latter have only a reasonable security as long as any instalments remain unpaid.

E. Cooper Willis, for the committee of inspection:—

I cannot deny that there is strong evidence in support of the custom among the trade, but the agreement in its terms is unreasonable, and is merely an evasion of the bankruptcy law. Any provisoes for increase of security in the event of the hirer's bankruptcy, or giving one creditor an undue preference over the

(1) 1 Ch. D. 501.

(3) Law Rep. 9 Ch. 602.

(2) Law Rep. 8 Ch. 520.

(4) 20 W. R. 925.

(5) 1 Ch. D. 503, n.

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—

other creditors, is bad : *Ex parte Mackay* (1) ; *Ex parte Williams* (2). Suppose the debtor had paid all except the last instalment and then became bankrupt, according to this agreement Messrs. *Hattersley* would have been able to take possession of the piano as their absolute property, and the debtor's estate would lose the benefit of all the previous payments, and that cannot be equitable. Besides, according to the terms of the agreement, *Hattersley & Co.* might take possession on default in the payment of any instalment, and at the time of the bankruptcy three instalments were in arrear. They have, therefore, been sleeping on their rights, and if they allowed the debtor to retain possession during that time it was at their own risk : *Freshney v. Wells* (3) ; *Spackman v. Miller* (4). There is no label on the piano to shew that it belongs to the Appellants. Under all these circumstances the Appellants cannot now retain the piano ; it must form part of the debtor's estate.

Judgment.
—

BACON, C.J. :—

The main question to be dealt with in this case is the alleged custom of hiring pianos upon this three years' system. Now, the existence of this custom is, in my opinion, proved conclusively, and indeed it can scarcely be said to be called in question at all by the Respondents. That being established, no other question arises. Whether Messrs. *Hattersley's* name, or any special label, was or was not on the piano seems to me unimportant, as is also the point as to whether Messrs. *Hattersley* have, by neglecting to take possession of the piano when default was first made in the payment of the instalments, forfeited their rights, because if the custom is valid, the agreement for hire is also valid, and the question of order and disposition cannot arise. Questions of order and disposition were in old times always questions for a jury, and in discharging in some sense the functions of a jury, I must say that the debtor kept the piano in his possession with the consent of Messrs. *Hattersley*, the true owners, but only upon the terms of that written agreement. It was suggested that this agreement is

(1) Law Rep. 8 Ch. 643.

(2) 7 Ch. D. 138.

(3) 26 L. J. (Ex.) 129.

(4) 31 L. J. (C. P.) 309.

an evasion of the bankruptcy law, but if the custom is clearly established (as I think it is), then the agreement is no evasion of the bankruptcy law, but a protection and security to the maker of the piano that the bankruptcy law shall not step in and deprive him of his right as against the general body of creditors. It has been argued that the provisions in the agreement giving the piano back to Messrs. *Hattersley* on the bankruptcy of the hirer, even though all the instalments but one may have been paid, are an evasion of the bankruptcy law, as giving an increased security and undue preference in the event of the bankruptcy of the hirer; but the answer to that is, that this stipulation for forfeiture is simply in the nature of a penalty, against which, on due cause being shewn, relief might be obtained elsewhere.

The question then comes back to the existence of this custom, for there is nothing in the case which induces me to come to the conclusion that the custom is an unreasonable one. I think the custom is distinctly proved—as in *Ex parte Powell* (1)—to be one which the ordinary creditors of the bankrupt may be presumed to have known; the agreement, therefore, is valid, and not within the mischief intended to be provided against by the *Bankruptcy Act*, 1869, s. 15, sub-s. 5. The order of the Court below must consequently be discharged. Costs out of the estate.

Solicitors: *Layton & Jaques*, agents for *D. H. Porrett, Sheffield*; *Charles Butcher*.

(1) 1 Ch. D. 501.

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Judgment.

C. A.

1877

V.-C. M.

Dec. 10, 11, 12,
14, 17.

C. A.

1878

March 30 ;

April 1.

METZLER v. WOOD.

[1876 M. 169.]

Trade-mark—Trade Designation—Title-page—Fraudulent Imitation.

The Plaintiffs were the publishers of a work intituled "*Hemy's Royal Modern Tutor for the Pianoforte*," a revised edition of which had been brought out in 1867, and which was well known and had an extensive sale, but was not so registered as to secure copyright. In 1874 the Defendant employed *Hemy* to revise an old work, intituled "*Jousse's Royal Standard Pianoforte Tutor*," which had formerly been in high repute, but had entirely fallen into disuse. This revised work the Defendant brought out under the title, "*Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor*," the word "*Hemy's*," both on the outside of the book and on the title-page, being printed in much larger and more conspicuous type than any other of the words:—

Held, by *Malins*, V.C., and by the Court of Appeal, that the Plaintiffs were entitled to an injunction restraining the Defendant from offering his work for sale with its present form, title-page, and cover, or any other form, title-page, or cover, calculated to deceive persons into the belief that it was the Plaintiffs' work.

Statement.

THIS was an action to restrain an alleged infringement of the Plaintiffs' copyright and trade-mark.

In 1865 the partnership of *D'Almaine & Co.* was dissolved, and the property of the firm, including the musical publications in which they had a copyright or were interested, was sold by public auction. Among these were "*Hemy's Royal Modern Tutor for the Pianoforte*" and "*Jousse's Royal Standard Pianoforte Tutor*." The former was bought by the Plaintiffs; the plates and copyright of the latter were bought shortly after the sale by the Defendant *Bickerton*, who, at the time when the action was commenced, carried on business as a music publisher under the style of "*Wood & Co.*"

Hemy's work had been written by *Hemy* in 1853 for *D'Almaine & Co.*, and was not registered so as to secure copyright. It went through several editions, and in 1867 was revised by *Hemy* for the Plaintiffs, who had given 500 guineas for it at the sale. It had a very great circulation, and at the time of the action it bore on the cover "Six hundredth Edition." "Specially revised and

enlarged by the author." It was deposed to that it was usual to style every fresh issue of 250 copies of a musical work an edition.

In 1874 the Defendant employed *Hemy* to prepare a revised edition of *Jousse's* work, which was an old work published more than fifty years ago, and had once been in high repute, but latterly had become almost unknown. This revised edition was printed for the most part from the original plates with some additions and some few alterations, and was brought out in 1875 under the title of "*Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor*," and the word "*Hemy's*" was printed, both on the title page and cover, in much larger letters, and was more conspicuous than any other part of the title.

After some correspondence the Plaintiffs commenced this action, alleging that they had as well the sole and exclusive copyright of and in the Plaintiffs' work as the sole and exclusive right (as well by way of copyright as of trade-mark) to the use of the title "*Hemy's Royal Modern Tutor for the Pianoforte*," and of the name of Mr. *Hemy* and of the word "*Royal*"; that the Defendant had employed *Hemy* in editing the Defendant's work for the purpose of obtaining a colourable excuse for the use of the name "*Hemy*" on the title-page and cover; that the Defendant had by his acts infringed and would continue to infringe the copyright and trade-mark of the Plaintiffs; that the effect of the acts of the Defendant was to make his work similar as well in appearance as in substance to and easily to be mistaken for the Plaintiffs' work, and that the Defendant did this for the purpose of deceiving, and had deceived and would deceive purchasers into the belief that the Defendant's work was the Plaintiffs' work. The Plaintiffs claimed damages, an account of profits, an injunction, and a delivery up of the plates from which the Defendant's work was printed, and all copies of the work.

The two works were similar in size and form, but the cover of the Plaintiffs' work was yellow, that of the Defendant's grey.

The cause came on to be heard before Vice-Chancellor *Malins* on the 10th of December, 1877.

Higgins, Q.C., *Solomon*, and *Maddison*, for the Plaintiffs.

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Statement.

C. A. *Glasse, Q.C., and Crossley, for the Defendant.*

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—
Judgment,
V.-C. M.
—

MALINS, V.C. :—

This case has entailed litigation of a very expensive nature, and has been protracted to a great length before me; but as it presents itself to my mind it is of a very simple nature. In 1875, *Hemy's* work having a very large sale, it occurred to the Defendant that he might avail himself of Mr. *Hemy's* services, and that if he could get Mr. *Hemy* to revise his works for him he might compete in the market with the Plaintiffs. If he had competed with them in a fair manner it would have been right, for competition in trade is not only allowable but laudable. If, therefore, he had confined himself to a proper use of Mr. *Hemy's* name, no question, I am sure, would have been raised by the Plaintiffs. The case does not rest on the contents of the books, for it is admitted that as the statutory provisions as to registration were not complied with there is no case of copyright. But when the Defendant came to print the cover, fair trading required that the exterior of the work should bear the name of *Jousse* as the prominent word, and that the name of *Hemy* as editor should be made subordinate. The question is whether the cover of the book is not calculated to deceive. The cases rest on a simple principle enunciated by Lord *Langdale* in *Croft v. Day* (1), which is, "that no man has a right to sell his own goods as the goods of another." That is the principle on which I decide this case. As to the interior of the book, there is no case for the interference of the Court. The question is, is the exterior intended to deceive or calculated to deceive? The Plaintiffs' book was no doubt commonly spoken of as "*Hemy's Pianoforte Tutor*." For people in speaking of or ordering a book do not commonly use the full title. Now, if the Plaintiffs' work had been recommended to me, and I had gone into a shop and asked for "*Hemy's Pianoforte Tutor*," and been served with a copy of the Defendant's work, I should have been perfectly satisfied, and should have believed that I had got the work which had been recommended to me. I therefore say that the cover of the Defendant's book is calculated to deceive, and I am sorry to say that I cannot acquit Mr. *Bickerton* of an intention to deceive pur-

chasers. There is some evidence, though not very strong, that the public actually were deceived. One witness says, "I went into a shop in the *Haymarket*, kept by Mr. *Butler*, and I asked for '*Hemy's Pianoforte Tutor*.'" Now, if the Defendant's work had not been published, there cannot be any doubt that he would have had handed to him the Plaintiffs' work, instead of which there was handed to him, apparently as a matter of course, a copy of the Defendant's work; and the same thing took place at a shop in the *Strand*. Being myself of opinion that the title is calculated to deceive, and finding that eminent musicians are of the same opinion, I can come to no other conclusion than that such is the case. If Mr. *Bickerton* had been inclined to treat the matter in a fair way, the correspondence which took place before the suit gave him ample opportunity for so doing. The Plaintiffs did not object to his using the name of *Hemy*, provided the work, as is usual in the case of new editions of standard works, was published under the name of the author only, adding the name of the editor.

It was urged that the Plaintiffs had made false statements, which disentitled them to relief. One was that this was the 600th edition of the Plaintiffs' work. Mr. *Metzler*, on his cross-examination, swore that it was the custom of the trade to call every fresh issue of 250 an edition, and that upwards of 190,000 copies had been sold. This is uncontradicted, and though I think such a custom a foolish one, I cannot say that a statement made in accordance with it is fraudulent. Then, again, it was urged that this purports to be a 600th edition specially revised by *Hemy*, whereas he never revised the work since 1867. I do not think, however, that I am bound to read the words as the Defendant contends. I read them as stating that this is a special revised and enlarged edition by Mr. *Hemy*, but I do not read them as necessarily meaning that this 600th edition, as distinguished from all former ones, has been so revised.

I am of opinion, therefore, that there must be an injunction to restrain the Defendant from publishing, selling, or offering for sale the Defendant's work in or with its present form, title-page, and cover, or any other form, title-page, or cover calculated to deceive persons into the belief that it is the Plaintiffs' work in the

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C. A. pleadings mentioned. I should have ordered the Defendant to pay the costs of the action, but as the expense has been considerably increased owing to the Plaintiffs going into the questions of copyright and the internal structure of the Defendant's work, on which questions he has failed, the Defendant ought not to pay all the costs. In order, therefore, to escape the difficulty of ascertaining how much of the costs is attributable to the questions on which the Plaintiff has failed, I order the Defendant to pay one half of the Plaintiffs' taxed costs.

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C. A. The Defendant appealed. The appeal was heard on the 30th of March and the 1st of April, 1878.

Argument. Glasse, Q.C., and Crossley, for the Appellant:—

The Defendant is at liberty to use the word "*Royal*." He is certainly allowed to use the name of *Hemy*, for it is only used in the way of a true and *bonâ fide* description: *Singer Manufacturing Company v. Wilson* (1); *Cheavin v. Walker* (2).

Higgins, Q.C., Solomon, and Maddison, contra, were not called on.

Judgment, C. A. JAMES, L.J.:—
James, L.J.

18 Ch. D. 80 It appears to me that the order of the Vice-Chancellor must be affirmed. There is really no question of law in the case, no question of the right of a man to the use of his own name, or anything of the kind. No such question arises as whether Mr. *Hemy* had sold his name, like a man selling his shadow. The simple question is: Did the Defendant dishonestly pass off his work as the work of the Plaintiffs? That really is the sole issue, and the Vice-Chancellor has found in favour of the Plaintiffs. It appears to me impossible to doubt the correctness of his conclusion. There was a work known as "*Hemy's Royal Modern Tutor for the Piano-forte*," which was the property of the Plaintiffs, as was known to the Defendant. It was very popular, and had a large sale. The Defendant had bought the copyright of a work, which, in its time, probably was a valuable work, but which was practically obsolete

(1) 2 Ch. D. 434.

(2) 5 Ch. D. 850.

at the time when the transaction took place. It was called "*Jousse's Royal Standard Pianoforte Tutor*," and inside it is called "*D'Almaine's New and Revised Edition of Jousse's Royal Pianoforte Tutor*." The Defendant employed Mr. *Hemy* to revise and bring out a new edition of it. There was nothing to prevent Mr. *Hemy* from employing his talents in that way; but, having done so, instead of the Defendant bringing out his work as "*Jousse's Royal Standard Pianoforte Tutor; New Edition revised by Hemy*," he brings it out with *Hemy's* name at the top, and in the largest type, even larger type than in the other, as "*Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor*." There is evidence in the case besides the comparison of the two works; there is evidence of distinguished musical men to shew that this was calculated to deceive the public, and that persons wanting to get the Plaintiffs' work might have the Defendant's given them without detecting the difference. I am bound to say that a comparison of the two things, which is always of importance in these matters of trade-mark, shews that the Defendant's title-page was calculated to deceive the public into the belief that they were buying the other publication—viz., "*Hemy's Royal Modern Tutor for the Pianoforte*." It was calculated to deceive; and I cannot conceive any reasonable theory to explain the Defendant's taking an obsolete work, getting it revised by Mr. *Hemy*, and putting *Hemy's* name as the prominent and striking distinguishing mark of his work, except that he intended to do that which the name was calculated to do—viz., to mislead the public into believing that, when they were buying the Defendant's work, they were buying the Plaintiffs'. If it was so calculated to mislead the public, the case of the Plaintiffs is made out. There is no difference in the law laid down in any of the cases. In the case of the *Singer Company*, the question was put whether the thing was calculated to deceive, and if so, whether the man was to be answerable for doing what he knew must be the result of his own actions; and therefore in that sense it is always a question of fraud. I am of opinion that here the fraud has been made out. The Vice-Chancellor's judgment must be affirmed, and the appeal must be dismissed with costs. As the Vice-Chancellor had the case before him, a part of the case failed, and he gave only half

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C. A. the costs, thinking that was a fair mode of dealing with it. I do
1878 not see any reason for departing from that.

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COTTON, L.J. :—

Judgment, C. A.
Cotton, L.J.

I see no reason for disturbing the Vice-Chancellor's judgment. The question is not whether the Plaintiffs have an exclusive right to the use of *Hemy's* name in connection with musical publications intended for the instruction of persons learning the pianoforte, nor whether the Plaintiffs have any exclusive right to the term "*Royal*" in any of these works. But it is simply this, has what the Defendant has done been done by him in order to pass off his work as the work of the Plaintiffs? Now, in my opinion, the use of the word "*Hemy*" in the way it has been used, coupled with the other circumstances of the case, properly leads to the conclusion at which the Vice-Chancellor has arrived. The Defendant's work is stated to be, and is, no doubt, in a great measure, a new edition of "*Jousse's Royal Standard Pianoforte Tutor*;" and if the Defendant had published his work in a different way, he might have published a new edition of "*Jousse's Royal Standard Pianoforte Tutor*," even although he had got it revised by *Hemy*, and even although he had stated that fact both inside and outside the book. But what has he done? The Plaintiffs' work having now, and I believe having previously had, *Hemy's* name on the outside of the book, what the Defendant does is this—though his book is *Jousse's*, revised by *Hemy*, he is not content with stating that; he puts the name "*Hemy*" prominently forward on the top of the page in the very largest type that is found in the whole of the book. Mr. *Glasse* said it was not a question of larger or smaller type; but in the well-known *Glenfield Starch Case* (*Wotherspoon v. Currie* (1)) great stress was laid on the fact that the word "*Glenfield*," by the size and character of the type, prominently caught the eye of any one who looked at the packets of the Defendant. Any one learning that "*Hemy's Pianoforte Tutor*" was the best for beginners, and going into a shop where he was shewn the work published by the Defendant, would naturally say, "Oh, this is no doubt it; this is *Hemy's*; I will take it." And, in my opinion, the Vice-Chancellor has arrived at a perfectly correct

(1) Law Rep. 5 H. L. 508.

conclusion, not only that the use of the word "*Hemy*" in the way it is put on the outside and in the title-page was calculated to mislead purchasers, but that it was intended to have that result, when we find that "*Jousse's Tutor*" had not been known for years. As far as I understand, no instance of its sale is known since the year 1858, when *Hemy's* book was brought out; and many distinguished musicians say that, as far as they knew, it was entirely a thing of the past. Then we find this defunct work started into life with the name of "*Hemy*" prominently put on the outside. Why was that done, but for the purpose of passing off the Defendant's book as that of the Plaintiffs?

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THESIGER, L.J. :—

Thesiger, L.J.

I am also of opinion that the learned Vice-Chancellor's order ought to be affirmed. There is no doubt that the Plaintiffs in their original statement of claim to a certain extent misconceived their rights, but it is clear, when you look at the amended statement of claim, that in the main they rested their case upon a right which the Vice-Chancellor has held, and which this Court also holds, that they possess. In the 9th paragraph of that statement of claim I find that the Plaintiffs (after having set out the acts of which they allege the Defendant to have been guilty) state that "the Defendant has, in fact, done and still continues and threatens and intends, unless restrained by this honourable Court, to continue to do the acts hereinbefore stated for the purpose of deceiving purchasers, and has by such acts deceived, and will, unless restrained by this honourable Court, continue to deceive purchasers into the belief that the Defendant's work is in fact the Plaintiffs' work, and several persons being so deceived as aforesaid have purchased the Defendant's work," and so on. Now, I am of opinion that the Plaintiff has made out the case alleged in that paragraph, for I am of opinion that the title-page which the Defendant has thought proper to adopt is calculated to mislead the public into the belief that the work was *Hemy's* well-known work, and I also am clearly of opinion that the title-page was adopted by the Defendant with that intention. It seems to me that a statement of a few of the facts will shew this to be the case. There are two works—the one *Hemy's* work, the other

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Jousse's work, and they were known under those names. The one, *Hemy's* work, was a modern work, a popular work in the market, and was first issued to the public in the year 1853 by *D'Almaine*, and was revised by *Hemy* in 1867. The other, a work, no doubt, of value and merit in its time, but which previously to the year 1867 had been out of the market, was known only by a few musicians, and apparently was not even known to musicians of such eminence as Sir *Julius Benedict*, Mr. *Brinley Richards*, and, I think, Professor *Rimbault*. Under these circumstances we find that the Plaintiffs purchased *Hemy's* work, giving for it a very substantial sum, viz., the sum of £500. We find, on the other hand, that the Defendant, Mr. *Bickerton*, purchased at the sale a considerable number of old plates for the sum of £110, among which were the plates of "*Jousse's Royal Standard Pianoforte Tutor*." What happened next? He has an interview with Mr. *Hemy*. And I may say that I attach some importance to the mode in which the re-publication of this work of *Jousse's* came about. It is obvious to my mind that the Defendant was minded, if he could, to make use of *Hemy's* name in order to get some pianoforte tutor into the market, because the conversation between him and Mr. *Hemy* commenced by suggestions on the part of *Bickerton* that he should publish in a new and revised form, not *Hemy's* work itself, but a sequel to the 100th edition, as it was called, of "*Hemy's Royal Modern Pianoforte Tutor*." Whether we have all the conversation which took place between Mr. *Hemy* and Mr. *Bickerton* is not very clear—I rather doubt whether we have; but obviously, whatever was the suggestion of *Bickerton*, it was one which Mr. *Hemy* considered was not a proper suggestion, and it was in consequence of that, that Mr. *Hemy* suggested there should be a new edition of *Jousse's* work. Now, I agree with the learned Vice-Chancellor in thinking that there is nothing in the work itself of which the Plaintiffs had a right to complain. But there is a most clear and obvious ground of complaint on the part of the Plaintiffs in the title-page which the Defendant has thought proper to adopt. How was the work of *Jousse* known in the year 1867? It had been edited and revised prior to the year 1867; because we find in a catalogue, and at *D'Almaine's* sale, that this work was spoken of as "*Jousse's Royal Standard Pianoforte Tutor*, edited by *Ford*."

Why, if the Defendant intended to act fairly by the Plaintiffs, should not this new edition of the work have been issued with a similar title-page. But, instead of that, we find a title-page such that everybody who went into a shop for the purpose of purchasing *Hemy's* work, having been told to purchase *Hemy's*, would, if this work were handed to him, be satisfied he had got the work he was sent to purchase. That is still more plain when we think of the class of persons who would be purchasers of this book, probably mothers of families, or governesses instructing young children, and who were told that *Hemy's* was the best work for the purpose of so instructing children. They would go to the shop and would be presented with a copy of the Defendant's work; and I will undertake to say there is not one person, whether of musical talent or knowledge, or not, that would not, unless he had thoroughly gone into the question of *Hemy's* and *Jousse's* works, be satisfied when he was presented with a copy of the Defendant's work that he was receiving that well-known and popular work of *Hemy's*. Under these circumstances, it seems to me clear that the Plaintiffs' ground of complaint is established, and at the same time equally clear, looking to the circumstances to which I have referred, that there has been an intention on the part of the Defendant to mislead the public into the belief that when they purchased copies of his work they were purchasing copies of the Plaintiffs' work.

Solicitors for Plaintiffs: *Chappell & Son.*

Solicitor for Defendant: *Joseph E. Turner.*

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Judgment, C. A.
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March 14.

C. A.

April 3.

In re REGENT UNITED SERVICE STORES.*Winding-up—Distress for Rent—Companies Act, 1862, s. 163.*

A company entered into possession of leasehold property under an arrangement with the tenant, but without any arrangement with the landlord. The rent payable by the tenant being in arrear, the landlord put in a distress, and on the same day a petition for winding up the company was presented, on which a winding-up order was shortly afterwards made. The liquidator applied for an order under the *Companies Act, 1862, s. 163*, to restrain the landlord from selling the goods. The liquidator agreeing to allow the landlord to come in and prove for the rent, *Malins, V.C.*, made an order allowing him to do so, and restraining him from selling:—

Held, on appeal, that the landlord was not a creditor of the company; that the Court had no jurisdiction to treat him as such; that sect. 163 does not apply where the person distraining is not a creditor of the company; and that the legal right of the landlord could not be interfered with.

Statement.

THIS was an application to restrain *William Henry Burke* from selling chattels which he had taken under a distress for rent upon premises in the occupation of the company.

On the 16th of June, 1876, *Burke* demised to the *Public Supply Association, Limited*, certain messuages in *Regent Street* and *Warwick Street* for $4\frac{3}{4}$ years, less fifteen days, from the 25th of March, 1876, at the yearly rent of £1600, payable quarterly on the four usual quarter days. The lease contained an express power providing that if the rent or any part thereof should be unpaid for ten days next after any one of the days appointed for payment, the lessor, although no legal or formal demand should have been made of the rent, might enter upon the premises and distrain, and sell and dispose of the distresses.

The *Regent United Service Stores, Limited* (hereinafter called the company), carried on its business upon the above premises under some arrangement with the association, the nature of which was not distinctly shewn, but it was admitted that the lease had not been assigned to the company, and that nothing had been done to constitute the relation of landlord and tenant between *Burke* and the company. There was some amalgamation between the company and the association, but the rent down to Michaelmas, 1877, inclusive, was paid by cheques of the directors of the association.

20CLD 262
21CLD 710
23CLD 187

On the 27th of December, 1877, Mr. *Burke* levied a distress for the quarter's rent due on the 25th, and seized all the goods on the premises. On the same day a petition for winding up the company was filed by a creditor, upon which, on the 18th of January, 1878, a winding-up order was made. Claims to some of the goods seized were made by a mortgagee, and to others by tradesmen who alleged that the goods had been deposited by them with the company to be sold on commission. The time for selling was extended by arrangement between the parties, but on the 19th of January *Burke* had the goods condemned to be sold. In the meantime the Petitioner, on the 18th of January, had given, by leave, short notice of motion to restrain *Burke* from selling. This motion, after repeatedly standing over, came on to be heard on the 14th of March before Vice-Chancellor *Malins*.

Higgins, Q.C., and *Bardswell*, for the motion.

Glasse, Q.C., and *Cracknall*, *contra*.

In re London and Devon Biscuit Company (1), *In re Dimson's Estate Fire-clay Company* (2), *In re North Yorkshire Iron Company* (3), *In re Traders' North Staffordshire Carrying Company* (4), were referred to.

The VICE-CHANCELLOR made an order restraining *Burke* from selling, and the liquidator agreeing to allow him to come in and prove as a creditor, it was ordered that he should be at liberty to do so.

Burke appealed. The appeal was heard on the 3rd of April.

Glasse, Q.C., and *Cracknall*, for the Appellant:—

I am not a creditor, and the order allowing me to come in and prove is nugatory. Neither the order of the Court nor the consent of the liquidator can give me any such right: *In re Traders' North Staffordshire Carrying Company*; *Giles v. Spencer* (5). The *ratio decidendi* in the case of *In re Lundy Granite Company* (6) is

(1) Law Rep. 12 Eq. 190.

(2) Ibid. 19 Eq. 202.

(3) 7 Ch. D. 661.

(4) Law Rep. 19 Eq. 60.

(5) 3 C. B. (N.S.) 244.

(6) Law Rep. 6 Ch. 462.

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that the Act applies only in the case where the landlord has the right of a creditor; in such a case he must come in rateably with the other creditors.

Higgins, Q.C., and *Bardswell*, for the liquidator :—

The circumstances of the case of *In re Lundy Granite Company* (1) were quite different from those of the present case. There the rent in respect of which the distress was put in had accrued after the winding-up and while the property was in the possession of the liquidator. Moreover, here *Burke* is a creditor, for he could maintain an action for use and occupation. *Woodfall's* Landlord and Tenant (2). The Court can let him in to prove: *In re North Yorkshire Iron Company* (3).

Judgment,
Jessel, M.R.

JESSEL, M.R. :—

In this case the company which is being wound up is in possession of the property upon which a distress for rent has been levied, but is not the lessee. Rent which accrued due before the winding-up is unpaid, and for this rent the landlord distrains. His common law rights are clear, but the Vice-Chancellor, under the statutory power contained in the *Companies Act*, 1862, s. 163, has interfered with his exercise of them.

The first question that arises is, whether the statutory provision applies where the landlord is not a creditor of the company. On this point I need not say more than that it was decided by the Lords Justices in the case of *In re Lundy Granite Company* that it does not apply. That decision is binding upon us, and we need go no further to find a reason for reversing the decision of the Vice-Chancellor.

Then it is said that the Vice-Chancellor treated *Burke* as a creditor, and put him in the position of a creditor as regarded proof. It was contended that, though not a creditor, he was like a creditor, and could be placed in the position of one. The answer is that he is not a creditor. He could not maintain an action for use and occupation; the right to possession was in his lessee, he therefore could not put the company in possession, and the use and occupa-

(1) Law Rep. 6 Ch. 462.

(2) 11th Ed. p. 499.

(3) 7 Ch. D. 661.

tion of the property by the company could not be by his consent. I cannot see what power the Vice-Chancellor had under the Act to put a man who was not a creditor in the position of a creditor.

There is only one other point which I wish to mention. It is said on one side, and denied on the other, that some of the goods taken under the distress are not goods of the company. Now, with deference to the Vice-Chancellor, it is clear, beyond the possibility of argument, that the Act cannot have any application to goods which do not belong to the company; for sect. 163, by its express terms, refers only to a distress "put in force against the estate or effects of the company."

COTTON, L.J. :—

I also am of opinion that this order cannot be sustained. The Vice-Chancellor made it under sect. 163, and unless that section applies to the case the order is clearly erroneous. If Mr. *Burke* is not a creditor, does that section apply? After the decision of the Court of Appeal in the case of *In re Lundy Granite Company* (1), that question is not open. In that case both the Lords Justices say that sect. 163 does not apply except in the case of a creditor. It is urged that in that case there were circumstances furnishing a sufficient ground for allowing the distress to be enforced although the case was within sect. 163. But the Lords Justices did not rest their decision on those circumstances, and it would be wrong to refer a decision of the Court of Appeal to grounds different from those on which the Court rested it. The Lords Justices gave their opinion on the construction of the Act, and held that the section did not apply where the person distraining was not a creditor, and we ought not to avoid that decision on the ground that there were in the case circumstances which, if he had been a creditor, might still have furnished sufficient reason for allowing him to distrain.

Then, is Mr. *Burke* a creditor? I need not add anything to what the Master of the Rolls has said to shew that he is not. If he was not, had the Vice Chancellor any jurisdiction to let him in to prove as a creditor? If he had, I am not sure that this would enable the Court to assume over Mr. *Burke*, without his consent, a

(1) Law Rep. 6 Ch. 462.

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jurisdiction to which persons not creditors are not subject. But there is no section in the Act which enables the Court to let a person in to prove as a creditor who is not a creditor. The Act says that the assets are to be distributed among the creditors, and if he is not a creditor the Court has no jurisdiction to let him in to participate in them.

It is said that some of the goods seized are not the property of the company. As regards them the order is clearly wrong, for sect. 163 by its express terms is confined to property of the company. The owners of the goods may have claims over against the company, but that cannot give the Court jurisdiction to interfere with the legal rights of the landlord.

Thesiger, L.J. **THESIGER, L.J.:**—

I also am of opinion that Mr. *Burke* was not a creditor of the company, that the Vice Chancellor had no jurisdiction to treat him as one, and that the case of *In re Lundy Granite Company* (1) is decisive on the question whether sect. 163 applies to such a case. It is said that the circumstances of that case were wholly different, for that the rent there accrued after the order for winding up. But the decision did not proceed on that ground. The *ratio decidendi* was not the difference between claims existing at the time of the winding-up order and claims subsequently arising, but that, where a person has no right to claim as a creditor against the company, the Court has no jurisdiction to interfere with his legal rights against the company's property.

Solicitors for Appellant: *Billing & Kent*.

Solicitors for Liquidator: *Rooks & Co*.

(1) Law Rep. 6 Ch. 462.

Ex parte POTTINGER. *In re* STEWART.

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Preferential Debts—Proof—Dividend—Voluntary Bonds or Covenants—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 12, 32, 41.

March 28;
April 11.

By virtue of sect. 32 of the *Bankruptcy Act, 1869*, the old rule in bankruptcy, that debts arising upon voluntary bonds or covenants of a bankrupt are to be postponed in the receipt of dividends to debts for valuable consideration, has been abolished.

All debts, except those to which by sect. 32 priority is expressly given, are now entitled to receive dividends *pari passu*.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

Statement.

By a deed dated the 11th of January, 1869, and made between *J. H. A. Stewart* of the one part and Sir *H. Pottinger* and *R. G. Barclay* of the other part, after a recital that *Stewart* was desirous of making some provision for his godson, *J. H. S. Smith*, an infant, it was witnessed that, in pursuance of that desire, *Stewart* did thereby for himself, his heirs, executors, and administrators, covenant with Sir *H. Pottinger* and *Barclay*, their executors, administrators, and assigns, that he during his lifetime, or his heirs, executors, or administrators, within six calendar months after his decease, would pay to Sir *H. Pottinger* and *Barclay*, or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of the deed, the sum of £4000, which was to be held by the covenantees upon the trusts therein declared for the benefit of *Smith*. In the year 1876 *Stewart* filed a liquidation petition, and his creditors resolved upon a liquidation by arrangement. No part of the £4000 had been paid to the trustees of the deed of covenant, and they tendered a proof for the £4000 in the liquidation. Upon the application of the trustees in the liquidation, the Registrar made an order, declaring that the proof ought to be postponed to the proofs of the creditors of the debtor for valuable consideration, and directing that no dividend should be paid upon the proof until the debts of the creditors for valuable consideration had been paid in full. The trustees of the deed appealed.

C. A. *Ince*, Q.C., and *E. C. Willis*, for the Appellants:—

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The old rule in bankruptcy that debts arising upon voluntary bonds or covenants must be postponed to debts for valuable consideration is abolished by sect. 32 of the *Bankruptcy Act*, 1869, which provides that certain debts which it specifies, *i.e.*, certain rates and taxes, salaries and wages, “shall be paid in priority to all other debts,” and adds that, “save as aforesaid, all debts provable under the bankruptcy shall be paid *pari passu*.” A new code of bankruptcy has been established by the Act of 1869. The right to prove now carries with it the right to receive dividends: *Bankruptcy Act*, 1869, s. 41; *Ex parte Honey* (1).

[JAMES, L.J.:—The old rule did not arise out of any statutory enactment; it was a rule established by the Judges.]

The jurisdiction in bankruptcy was part of the ordinary jurisdiction of the Lord Chancellor, and he imported into bankruptcy the rule which the Court of Chancery had adopted in the administration of the estates of deceased persons: *Gardiner v. Shannon* (2); *Ex parte Hall* (3); *Ex parte Spurrier* (4). The Act of 1869 has dealt expressly with voluntary settlements by sect. 91: *Ex parte Bishop* (5). The point now raised has never yet arisen under the Act of 1869, except with reference to debts due to a friendly society by one of its officers, which debts had priority in bankruptcy under the *Friendly Societies Act* (18 & 19 Vict. c. 63), and it has been held by several County Court Judges that that priority is now abolished by sects. 12 and 32 of the *Bankruptcy Act*, 1869. The Bankruptcy Act of 1849 contained no such provision as that which is contained in the Act of 1869; it left the right to receive the dividends as it stood under the previously existing rules: sects. 164, 187. And sect. 33 of the Act of 5 Geo. 2, c. 30, contained no enactment that all debts, with certain exceptions, should be paid *pari passu*.

[JAMES, L.J.:—Suppose a man on the eve of bankruptcy were to enter into a voluntary covenant to pay a large sum of money to a member of his own family?]

(1) Law Rep. 7 Ch. 178.

(3) 1 Rose, 30.

(2) 2 Sch. & Lef. 228.

(4) Mont. 246.

(5) Law Rep. 8 Ch. 718.

The Court has ample power to deal with any case of fraud. No fraud is suggested in the present case. The old rule as to voluntary bonds was very absurd; under it the obligee of a voluntary bond, if he surrendered it in consideration of another bond, was allowed to prove on the new bond: *Ex parte Berry* (1); and a bond given for arrears of interest due on a voluntary bond was held to be a bond for value: *Gillham v. Locke* (2). Now, however, the rights of proof and dividend are fixed entirely by the Act of 1869.

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De Gex, Q.C., and *Northmore Lawrence*, for the trustees in the liquidation:—

The proviso at the end of sect. 32 has not altered the old rule of administration in bankruptcy. The words "*pari passu*" only mean that the administration of the estate shall be according to the rules of equity. But for the fact that the debt arises upon an instrument under seal, the holder of a voluntary bond could not compete with creditors for value, and a seal is of no importance in bankruptcy. When Lord *Eldon* decided *Ex parte Hall* (3), the Act in force was 5 Geo. 2, c. 30. Sect. 33 of that Act provided that the bankrupt's estate should be divided amongst the creditors who had proved under the commission "in proportion to their several and respective debts;" that is the same thing as a division *pari passu*. Sect. 32 of the Act of 1869 only means that the debts which it specifies are to have priority under the Act; all other debts are to be subject to the rules of equity. A joint creditor can prove, but he cannot receive dividends if there is a solvent partner. A joint creditor cannot receive dividends from separate estate until the separate debts have been paid in full, and *vice versa*. Sect. 32 merely means that there shall be no privileged creditors except those which it specifies; it was not intended to "level up."

Ince, in reply:—

Where the Legislature intended that there should be special provisions with regard to any kind of debt, it has made them expressly, as by sect. 91, with regard to voluntary settlements.

(1) 19 Ves. 218.

(2) 9 Ves. 612.

(3) 1 Rose, 30.

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[JAMES, L.J., referred to *In re Wood* (1).]

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No answer has been given to the argument founded on the use of the words "*pari passu*." They should be understood literally: *Ex parte Bishop* (2).

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April 11. JAMES, L.J.:—

In this case the Registrar has admitted to proof a debt arising upon a voluntary deed of covenant, but has postponed the receipt of dividends until all the creditors for value shall have been paid in full. It was admitted by the Appellants that, according to the well-established law, practice, and principles of the Court of Bankruptcy, which were in that respect analogous to those of the Court of Chancery with reference to the administration of the estates of deceased persons, a voluntary bond or covenant must have been, before the *Bankruptcy Act*, 1869, postponed to what are called onerous obligations. But the Appellants have contended that the matter is now the subject of distinct statutory enactment, and I am of opinion that that contention must prevail. The 32nd section of the Act of 1869 says that "the debts hereinafter mentioned shall be paid in priority to all other debts." Then it enumerates certain debts, and, after doing that, it ends with these words, "save as aforesaid, all debts provable under the bankruptcy shall be paid *pari passu*." All debts "provable under the bankruptcy." The debt due to the Appellants is a debt provable under the bankruptcy, and all debts provable under the bankruptcy are expressly declared to be entitled to be paid *pari passu*.

The contention on the part of the Respondents really amounts to this, that these words have no operation, and that the section is to be read as if it were "the debts hereinafter mentioned, and certain other debts, shall be paid in priority." This, it appears to me, is a mode of construing the section which it is not competent to us to adopt. It is true that in many cases the Court of Bankruptcy has gone behind, so to say, the code of law established by this Act of Parliament, in adopting several principles which

(1) Law Rep. 7 Ch. 302.

(2) Law Rep. 8 Ch. 718.

were previously established. But I think it will be found that all those cases are mere illustrations and applications of this one principle, that the present Court of Bankruptcy has the same jurisdiction and the same duty which was acknowledged by the old Courts of Bankruptcy, that is to say, to prevent any thing being done which would be a fraud upon or an evasion of the bankruptcy law. On that principle we, in *Ex parte Saffery* (1), dealt with an attempt on the part of the *Stock Exchange* to distribute part of the assets of one of their members among a particular class of creditors; we have gone behind judgments obtained against a debtor just before his bankruptcy, in investigating the consideration for those judgments; we have defeated attempts to make a man's property go over to a particular creditor in the event of his bankruptcy, to prevent a debt from being one debt until the debtor's bankruptcy, and becoming another and bigger debt in the event of his bankruptcy, for the purpose of giving the creditor a larger dividend. All of these cases are governed by the same principle, and are in the same direction. So, in the present case, if there had been any sustainable suggestion that this covenant was in fact entered into by the covenantor on the eve of bankruptcy, at a time when he was insolvent, or when it could reasonably be inferred that it was really intended, not to create an obligation on himself, but only to enable the favoured person to come in and take part of the assets belonging to the creditors, I have no doubt that the Court would find the means of defeating any such a scheme, just as it has defeated other schemes and devices which were contrary to the meaning and spirit of the bankruptcy law. But that not being so in this case, I am of opinion that we must give effect to the plain literal meaning of the words of sect. 32, by saying that the Appellants' debt, being provable and having been proved, is entitled to share in the receipt of dividends with the other creditors.

COTTON, L.J. :—

I am of the same opinion. The Appellants have been admitted to prove, but, as their debt arises on a voluntary deed, the Regis-

(1) 4 Ch. D. 555; S. C. *sub nom.* *Tomkins v. Saffery*, 3 App. Cas. 213.

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trar has held that they ought to be postponed in the receipt of dividends until all the creditors for value, the onerous creditors, have been paid in full. Now it is clear that this would have been so up to the passing of the Act of 1869. That, however, was not in consequence of any statutory enactment, but the rule arose simply in this way: there being no statutory enactment applicable to such a case, the Judges, in administering the bankrupt law, followed the rule which prevailed in equity. The Court of Chancery, in administering the estates of deceased persons, looked upon bonds, covenants, and judgments, if voluntary, in the light of legacies, and paid them only after all the debts for valuable consideration had been paid, paying simple contract debts before voluntary bonds.

The question therefore is whether or not the law in this respect has been altered by the Act of 1869, and in my opinion it is impossible to get out of the clear words of sect. 32. That section is dealing expressly with the priority of the payment of debts which are proved, and it says that certain debts shall be paid in priority to all other debts, and that "save as aforesaid all debts provable under the bankruptcy shall be paid *pari passu*." Those are the clear words of the section, and in my opinion we ought to give them their fair construction, and not to nullify them by adopting the old rule and practice which prevailed when there was no statutory enactment on the subject. Here we have a statutory enactment, and, on the fair rules of construction, in my opinion we ought to hold that it is applicable to this case. If this was not the intention of Parliament, it is for them and not for this Court to set the matter right.

It was suggested in argument that to allow a voluntary bond to come in competition with the creditors for value would open a wide door for fraud; it would enable a man, it was said, on the eve of his bankruptcy to give a number of volunteers power to come in and compete with his creditors. In my opinion our decision will have no such result, for, if it were shewn that the voluntary bond was given by a person who afterwards became bankrupt under circumstances where a voluntary settlement would not be good, the Court ought not to admit the proof, but ought to hold the bond

bad as a fraud on creditors. The Court has full power so to hold, even although sect. 91 of the Act, which relates to voluntary settlements, may possibly not apply to mere bonds. But the proper remedy, in the case of any attempt so to defraud creditors for value, would be for the Court to say, "This bond is a fraud upon creditors, and therefore cannot be admitted to proof." In the present case no such question arises. The covenant is of some years' standing, and there is no suggestion of any fraud or intended fraud. Therefore the debt has been admitted to proof, and, having been admitted to proof, I am of opinion, on the clear words of sect. 32, that dividends ought to be paid upon it rateably with the other debts.

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THESIGER, L.J.:—

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I also am of opinion that this appeal should be allowed. The words of sect. 32 are very clear and distinct, and in their natural construction mean that where there is a right of proof there shall be a right to dividend. But it has been argued by Mr. *De Gex* that the real meaning of the Act is this, that preference shall be given to certain debts, and that, after they have been paid in full, all the other debts shall be paid *pari passu*, subject to what may be termed the common or general law in bankruptcy as it existed at the time of the passing of the Act.

Now, even if one could collect from the other parts of the Act itself any indication to that effect, I think that the words of sect. 32 are too strong to allow of such an interpretation being put upon them. But when we look at the other parts of the Act we fail entirely to find any expression of an intention on the part of the Legislature that there should be that interpretation. In sect. 91 the Legislature deals specially with voluntary settlements, enabling them to be set up, and to be valid under certain circumstances, although the property comprised in them would be absolutely taken away from the creditors for the persons who are the objects of the settlement. It seems to me, therefore, that it cannot be properly argued that there was any intention that voluntary bonds should be dealt with by the bankrupt law apart from the special terms of sect. 32. Under these circumstances, this covenant, even though it be a voluntary one, comes distinctly within the terms of

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sect. 32. It being admitted that there is a right to prove in respect of it, it follows that there is a right to receive dividends *pari passu* with the other creditors.

Solicitors for Appellants: *H. C. Nisbet, Rooke, & Daw.*
Solicitor for Trustee: *Benn Davis.*

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*April 12, 13.**In re* DUDSON'S CONTRACT.

[1877 D. 206.]

Tenant in Tail—Disentailing Deed—Protector—Owner of Prior Estate—
3 & 4 Will. 4, c. 74, ss. 22, 27, et seq.

In the 22nd section of the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), which points out the person who shall be protector of the settlement, the "owner of the prior estate" is the person who is entitled under the settlement to the beneficial enjoyment of the rents and profits.

In a will made before the passing of the Act the testator, being entitled to the equity of redemption of a freehold estate, devised the same to trustees and their heirs to the use of them and their heirs during the life of *A.* (a married woman), in trust for *A.* for her separate use, with remainder to the use of *B.* in tail, with remainders over. In 1871, the legal estate being still outstanding, the first tenant in tail, with the consent of *A.* as protector, disentailed the estate:—

Held (affirming the decision of *Jessel, M.R.*), that the entail was effectually barred, *A.*, and not the trustees, being the proper protector of the settlement.

Statement.

THIS was an appeal from an order made by the Master of the Rolls in Chambers under the *Vendor and Purchaser Act* (37 & 38 Vict. c. 78), s. 9.

Jane McKnight, by her will, dated the 14th of October, 1803, devised a freehold house and premises at *Carlisle* to *J. Henderson* and *J. Tallentire*, and their heirs, to the use of them and their heirs during the life of her daughter *Jane*, afterwards *Jane Cockburn*, in trust for the said *Jane Cockburn* for her separate use, and after her death to the use of the first and other sons of *Jane Cockburn* successively in tail, with divers remainders over. The testatrix died soon after the date of the will.

At the date of the will and of the death of the testatrix the house and premises at *Carlisle* were subject to a mortgage in fee,

and at the date of the deed next mentioned the legal estate was still outstanding in the mortgagee.

By an indenture dated the 19th of October, 1871, and made between *J. T. Cockburn*, the first tenant in tail under the will of *Jane McKnight*, of the first part, the said *Jane Cockburn* of the second part, and *T. Wright* of the third part, and duly inrolled under the *Fines and Recoveries Act*, the said *J. T. Cockburn*, with the consent of *Jane Cockburn* as protector of the settlement, barred the entail in the property, and conveyed it to the use of himself in fee simple.

J. T. Cockburn afterwards sold the property subject to the mortgage to *C. Dudson*, who contracted to sell it to *E. Kinsella*. The purchaser took the objection that Mrs. *Cockburn* was not the proper protector of the settlement, and consequently that the disentailing deed was not effectual to bar the remainders over. A petition was accordingly presented by the purchaser under the *Vendor and Purchaser Act*, which was heard before the Master of the Rolls in Chambers. His Lordship overruled the objection and dismissed the petition. The purchaser appealed from this decision.

Cavanagh, for the Appellant:—

The question turns upon the construction of the various sections of the *Fines and Recoveries Act* with relation to protectors. The principal section is the 22nd, which enacts that the owner of the prior estate, if freehold, is to be the protector; the question is, therefore, who is the owner of such prior estate in the present case? It has been taken for granted by conveyancers that where there is a trustee and a *cestui que trust* of the prior estate, the *cestui que trust* is in all cases the "owner" under the statute. But there is no judicial authority for this; it only rests upon the opinion of Lord *St. Leonards*, in his treatise on the Real Property Statutes (1), which has been followed by other text-book writers.

It is clear that this could not have been the view of the framers of the Act; for if the 22nd section meant that where there is a trustee and *cestui que trust*, the *cestui que trust* should in all cases be the protector, it would have been unnecessary to provide by sect. 27

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that a "bare trustee" should be excluded. I contend that "the prior estate" means prior in limitation as well as prior in time; so that if there is an estate given to *A.* and his heirs during the life of *B.*, in trust for *B.* with remainder to *C.* for life with remainder in tail, in that case *A.* and *B.* have the first prior estate in point of time, but *A.* alone has the prior estate in point of limitation, and therefore he would be protector. The trustees here are not bare trustees, for they have duties to perform, and also a certain beneficial interest, inasmuch as they have power to indemnify themselves against loss, and could if necessary mortgage the estate for that purpose: *Poad v. Watson* (1). If the beneficial owner is in all cases to be held to be the protector, it would often lead to absurd consequences: for instance, if a testator gave the first freehold estate to trustees upon trust to provide for payment of his debts, all his creditors would have to give their consent as protectors to a disentailing deed. For the interpretation of the statute for which I contend, I rely on sects. 14, 15, 22, 27, 28, 33, 34, 36, 37, 39, 40, 47, and on *Keer v. Brown* (2), *Lysaght v. Edwards* (3), *Taylor v. Taylor* (4). The 24th section has no bearing on this case, because it applies only between a married woman and her husband, and not between a married woman and her trustees.

In the second place, I contend that if the present trustees should be held to be bare trustees within the 27th section, the 31st section makes them protectors, this settlement having been made before the passing of the Act. They would have been the proper persons to make a tenant to the *præcipe* for suffering a common recovery. This was the ground relied on before the Master of the Rolls, but without success. It is contended on the other side that all the estates are equitable, and therefore the trustees have really no estate at all in the land, and that *Mrs. Cockburn* is the only person who has any estate prior to the estate tail which the Courts either of Law or Equity could recognise. But the trustees cannot be so set aside.

[*Joshua Williams*, Q.C., referred to *Nouaille v. Greenwood* (5).]

In that case the tenant in tail was in possession; and, moreover,

(1) 25 L. J. (Q.B.) 396. *28 L.J.* (3) 2 Ch. D. 499, 506, 516.

(2) Joh. 138. *5 Jur. 457* (4) 3 Ch. D. 145.

(5) T. & R. 26.

the remainders were all trust estates of a like nature with the estate of the tenant in tail. The particular estate and the estate in remainder must be all one estate, or else the recovery was not well suffered: *Jennings' Case* (1). In the present case the trustees and the remainder in tail had all one estate. The equity of redemption is not a mere equitable estate. In the view of the Courts of Equity, it is the ownership of the land. The mortgagee has in such view only an interest of a personal nature in the land, and the mortgagor continues seised of the absolute estate, so that the equity of redemption remains subject to all the uses of the settlement, and may be limited in trust so as to vest an estate in the trustee: *Casborne v. Scarfe* (2); *Wykham v. Wykham* (3); *Wood v. Wood* (4); *Powell on Mortgages* (5); *Cholmondeley v. Clinton* (6); *Coape v. Arnold* (7); *Boteler v. Allington* (8); *Scully v. Scully* (9); *Pawlett v. Attorney-General* (10).

There is another objection to the disentailing deed: the grantee to uses did not execute it, and although there is no evidence that he has disclaimed, yet he or his heirs may do so, in which case the deed might be defeated. If the grant had been a common law grant, the deed certainly would be defeated by such a disclaimer: *Peacock v. Eastland* (11); *Sheppard's Touchstone* (12). And it is doubtful whether the same doctrine would not apply to a conveyance under the *Statute of Uses*: *King v. Boys* (13).

JAMES, L.J.:—There is no validity in that objection.

Joshua Williams, Q.C., and *Mounsey Heysham*, for the vendor, were not called on.

JAMES, L.J.:—

In the year 1833 an Act was passed for providing new machinery for disentailing estates in lieu of the cumbrous process of suffering a common recovery. The 22nd section of this Act pro-

(1) 10 Rep. 43 b.

(2) 1 Atk. 603.

(3) 18 Ves. 395.

(4) 7 Beav. 183.

(5) Vol. i. p. 108, n.

(6) 2 Jac. & W. 182.

(7) 4 D. M. & G. 574.

(8) 1 Bro. C. C. 72.

(9) 3 Ir. Eq. 494.

(10) Hardr. 465.

(11) Law Rep. 10 Eq. 17.

(12) Page 125.

(13) Dyer, 283 b, pl. 31.

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vides that where there is an estate for life subsisting prior to the estate tail, "the person who shall be the owner of the prior estate, or the first of such prior estates if more than one," shall be the protector of the settlement. The true construction of this clause of the Act was a matter of great importance, and from the time of the passing of the Act it has been the universal opinion and the universal practice of conveyancers that the "owner of the prior estate" meant the substantial owner of the estate, that is, the owner of the beneficial interest. That construction has been settled, and family settlements and purchases been made on the faith of it, for a period of forty-five years. And we have now been asked to introduce confusion into this state of things, and to say that what was understood by all lawyers to be settled was obviously wrong and contrary to the true construction of the Act of Parliament. We have been addressed for several hours, and a minute examination of the sections of the Act has been gone into, and cases from the earliest times cited to us, for the purpose of establishing the proposition that this construction of the clause has been wrong, and that it is to be construed as if the words had been "the estate which is prior in time and prior in limitation;" and this construction has been supported with almost mediæval and scholastic subtlety. In my opinion the contention is quite inadmissible. We are also asked to say that in a case where an equitable estate is limited to trustees for the sole and separate estate of a married woman during her life, with remainder to her first and other sons in tail, the lady is not the owner of the prior estate for life; and that if it had been under the old law she would not have been the proper person to concur in making a tenant to the *præcipe*. It was the settled practice that in equitable recoveries the person who made the tenant to the *præcipe* was the person who had the real equitable ownership. The case cited by Mr. *Joshua Williams*, *Nouaille v. Greenwood* (1), disposes of the whole question.

Cotton, L.J.

COTTON, L.J. :—

I am of the same opinion. It is remarkable that the point principally relied on was not argued before the Master of the Rolls.

(1) T. & R. 26.

The real question is whether, in a case in which all the estates are equitable, a married woman entitled for life for her separate use is the owner of the prior estate within the meaning of the 22nd section of the Act. In my opinion she clearly is. It was suggested that the persons named as trustees must be considered as the owners. They have nothing vested in them. If the estate given to the trustees had been a legal estate, the remainders also being legal, a question might have arisen as to the effect of the 31st section. But how is it possible that, there being no legal estate in them and no beneficial interest, they can be in any sense owners of the prior estate? There may be more difficulty as to the effect of the 28th section, namely, whether when a bare trustee is excluded the office of protector is to go to the person who has the beneficial interest, or to some other person. On this point I express no opinion; it has no application to the present case. I decide on the ground that upon the true construction of the 22nd section this lady was the owner of the prior estate. I should be very reluctant to overthrow a construction which has been adopted by conveyancers upon the opinion of Lord *St. Leonards* expressed so long ago, and on which so many titles have been founded. But I do not decide upon the ground that the construction has been adopted by conveyancers, but because, in my opinion, it is the true and reasonable construction of the statute.

It was suggested in argument that if an estate were given to trustees during the life of a person upon trust to pay the rents and profits to the settlor's creditors, followed by a remainder in tail, the effect of our decision would be that all the creditors would have to give their consent as protectors of the settlement. But in that case the trustee would be the owner of the prior estate; it is impossible by any stretch of language to say that the creditors would be the owners of the estate.

The second objection was founded on the enactment in sect. 31—that where in a settlement made, as in the present case, before the passing of this Act, the person who would have been the proper person under the old law to make a tenant to the *præcipe* is a bare trustee, such person shall still be protector of the settlement; and it is said that, assuming these persons to be bare trustees, they would have been the proper persons to make a tenant to

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the *præcipe*. But that is an entire mistake. Under the old law, where the estate tail was legal the person to create the tenant to the *præcipe* must have the legal estate, but where the estate tail was equitable, the person to create the tenant to the *præcipe* was the person entitled to the enjoyment of the rents and profits. In this case all the estates were equitable, and the lady being entitled to the beneficial enjoyment would have been the person to make a tenant to the *præcipe*, and not the trustee.

Thesiger, L.J. THE SINGER, L.J. :—

I am of the same opinion. For forty-five years one uniform construction has been placed on the 22nd section, and has been acted on by conveyancers. Therefore, before I could consent to overthrow this construction and adopt any other, I should require to be convinced that it was clearly opposed to the reasonable intention of the Act. Far from that, the construction which for forty-five years has prevailed appears to me the most reasonable construction. The question depends almost entirely on the 22nd section. The protector is to be the owner of the prior estate, and the construction clause says that the word "estate" is to extend to an estate in equity as well as at law. Here we have entirely to do with estates in equity. The trustees are persons who have no interest; the beneficial ownership is in the daughter of the testator. In such circumstances, the words "the owner of the prior estate" can only be satisfied by holding that such owner is the beneficial owner entitled to actual enjoyment of the rents and profits. The only plausible doubt that was suggested arose out of the 28th section, but such doubt is not sufficient to override the clear words of the 22nd section. The only other clause to which I shall refer is the 31st. I agree with Lord Justice Cotton that it does not apply to a case like the present, where the trustees are trustees of an equity of redemption, and are not entitled to any beneficial occupation.

Solicitors: *Matthews & Greetham*, agents for *T. Johnson, Carlisle*.
Gray & Mounsey, agents for *Mounsey & Co., Carlisle*.

In re AMBROSE LAKE TIN AND COPPER COMPANY.

CLARKE'S CASE.

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April 17.

Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25—Issue of Shares.

A company was formed for working a mine in *Cornwall*, the purchase-money for which was to be paid in fully paid-up shares to be allotted to the vendor or his nominees. On the 18th of January the memorandum and articles and the contract with the vendor were sent down by post from *London* to be registered in *Cornwall*. On the following day the directors met in *London*, in the belief that all the documents had been registered, and the vendor nominated the allottees of his paid-up shares, and the directors resolved that they should be allotted accordingly. On the next day the managing director, finding that although the memorandum and articles had been registered the contract had not been registered, told the secretary not to issue certificates nor allow any dealings with the shares till it had been registered. The contract was registered on the 26th of January. No register of shareholders nor any books of the company were in existence till after the 26th, but before that day some of the paid-up shares had been transferred. No certificates were issued, nor was anything further done by the company with reference to the shares till after the 26th. The books were afterwards made up, treating the shares as allotted on the 19th, and registering the transfers as made on the days on which they bore date:—

Held, that the shares were not to be considered as issued before the registration of the contract, and that they were to be treated as fully paid-up shares.

THIS was an appeal by *Clarke* from an order of the Vice-Warden of the *Stannaries* placing his name on the list of contributories of the *Ambrose Lake Tin and Copper Company, Limited*, for 164 shares.

Statement.

By a contract in writing dated the 22nd of December, 1871, *W. Eaton* agreed to sell the *Ambrose Lake Mine* to *Joseph Taylor* and *John Hardey* as trustees for an intended company, to be called the *Ambrose Lake Tin and Copper Mining Company, Limited*, for £24,000, to be paid in 6000 fully paid-up shares of £2 each in the company, and 12,000 shares with £1 apiece paid on them.

The intended company was registered on the 19th of January, 1872, with a nominal capital of £36,000, in 18,000 shares of £2 each, and its registered offices were in *London*. The mine for

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working which it was formed being in *Cornwall*, it was necessary for the registration to be made in the *Stannaries*. The memorandum and articles of association and the above contract were sent down from *London* to *Cornwall* by post on the 18th of January. The memorandum and articles of association were registered accordingly on the 19th, but the Registrar declined to receive the contract on the ground that it was insufficiently stamped. The result was that the contract was not registered till the 26th of January.

On the 19th of January the directors met in *London* in the full belief that the articles and contract had been registered on the morning of that day, and at their meeting *Eaton* nominated the persons to whom the 6000 fully paid-up shares and the 12,000 shares with £1 each paid up should be allotted. A large number of fully paid-up shares and of shares on which £1 per share was paid were, by *Eaton's* direction, allotted to *Taylor*, and the rest were allotted to the other directors. A call of 1s. per share was at this meeting made on the partly called up shares. *Taylor* transferred to *Clarke* 100 of his shares, on which £1 was to be taken as paid. This transfer appeared, from the books of the company, to have been made on the 20th of January, 1872, and registered on the 25th of the same month. The other sixty-four shares were also derived from *Taylor*. A transfer, dated the 22nd of January, from *Clarke* to another person of twenty of these 100 shares was also put in. The books of the company upon their face shewed the allotments to have been made on the 19th of January and the shares issued.

Eaton, who was the secretary of the company, deposed that on the 20th or 21st of January, 1872, a letter was received in *London* informing the directors that the contract had not been registered. That *Taylor*, as managing director, thereupon directed him not to issue certificates of the shares which had been allotted, nor to take or permit any other proceedings with reference to the company or its shares, until after the agreement had been registered, and that he obeyed such instructions. That no part of the call which had been made was payable till the 29th of January. That letters of allotment were not sent out. That neither the register of shareholders nor the register of transfers was made up by the

deponent as secretary till the 3rd of February, 1872, and that it was not till that day that the books were furnished to him. That no certificates were issued, nor was there any register of shares or transfers in existence till after the contract had been registered, and that no certificates for any of the shares were issued until the 21st of February, 1872, when the deponent sent them out in a letter containing a list of them, which letter and list he verified.

Taylor also deposed that no certificates had been issued till February, 1872.

£1 per share was afterwards paid in cash on all the shares which had been allotted as shares with £1 per share paid on them.

An order having been made for winding up the company, *Clarke* was placed on the list for the 164 shares. The books of the company were produced before the Vice-Warden without any rebutting evidence, but further evidence having been admitted on the hearing of the appeal, the facts above deposed to by *Eaton* appeared.

Waller, Q.C., and *Bunting*, for the Appellant:—

Upon the facts now appearing in evidence it is clear that there was not anything that can be called an issue of shares until after the contract had been registered. The requisitions of the Act (30 & 31 Vict. c. 131, s. 25) were therefore complied with: *Hartley's Case* (1); *Bush's Case* (2).

Marten, Q.C., and *Northmore Lawrence*, for the liquidator:—

The evidence comes in substance only to this, that no share certificates had been given out. The allottees became owners of the shares on allotment. The certificates were only evidence, and the not having them did not make the shares remain unissued. Transfers of shares were made before the registration of the contract, and have been registered. In *Hartley's Case* there was a regular cancellation and new allotment. *Blyth's Case* (3) shews that the issue of certificates is not necessary to the issuing of

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(1) Law Rep. 18 Eq. 542; 10 Ch. 157.

(2) Law Rep. 9 Ch. 554.

(3) 4 Ch. D. 140.

O. A. shares. In *Bush's Case* (1) the certificates were dated after the
 1878 registration of the contract: here they refer to the old date.

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COCKBURN, L.C.J.:—

Judgment,
 Cockburn, L.C.J.

I must say I entertain no doubt upon the question before us, which turns upon what is the meaning of the term "issue" in the statute 30 & 31 Vict. c. 131, s. 25. The company was perfectly competent to allot shares, and did allot shares. The Act of Parliament imposes no condition upon allotment such as it imposes on the issue of shares, and I think that, inasmuch as the term "issue" is used, it must be taken as meaning something distinct from allotment, and as importing that some subsequent act has been done whereby the title of the allottee becomes complete, either by the holder of the shares receiving some certificate, or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire and complete. Now here, upon the facts of the case, it is plain that the allotment having been made under the belief that the agreement between the vendor and the company had been duly registered at the proper place of registration, which turned out afterwards to be a mistake, and that mistake having been discovered before anything more had been done than the allotment of the shares, the person who appears to have had competent authority to do what he did, or upon whose authority, at all events, the secretary of the company acted, suspended everything, and nothing further was done on the part of the company until after the agreement had been registered. I do not think it material to consider what may have been done by any allottee who, knowing of the allotment, considered that he was entitled to deal with these shares as his shares, although his title was not then complete. As regards the company, nothing whatever was done beyond that mere allotment of the shares. In my opinion that does not constitute the "issuing" of the shares, for which something more than the mere allotment is necessary. The enactment is probably a salutary one; it has, at all events, this beneficial operation, that it prevents a man who has taken shares from setting up in opposition to the claims of creditors that his shares,

(1) Law Rep. 9 Ch. 554.

which, for anything that the public can discover to the contrary, are shares to be paid upon, are in fact to be taken as paid-up shares. But I cannot say that the mere allotment is what the Act of Parliament contemplated, especially where the parties in making it have acted under a *bonâ fide* belief, which afterwards turned out to be mistaken, that a contract had been registered. I think, upon the whole, that although this case may not be immediately within the terms of *Bush's Case* (1), it is within the principle of it, and that it does not fall within the penalty imposed by the 25th section of the *Companies Act*, 1867.

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JAMES, L.J.:—

James, L.J.

I am of the same opinion. It seems to me quite clear that up to the time and at the time when the agreement in question was registered with the proper officer in *Cornwall*, nothing had occurred by virtue of which the company could have said to the shareholder, "You are bound to take shares from me," nor anything by virtue of which the shareholder could have said, "I have become a shareholder in your company." No minute had been recorded, no share list had been made up, no communication had taken place, except mere talk of an allotment at a meeting at which Mr. *Taylor* was, for this purpose, a mere clerk. There was no entry in the minutes of the directors, but a mere talk of an allotment which was to be made in pursuance of an agreement and under the belief that the agreement had been duly registered. It appears to me quite clear that if the company had been wound up the day afterwards, or at any time before that agreement was registered, nobody could have said that these gentlemen were shareholders. Before anything is done by which their title is completed, or by which the evidence of their title as between them and the company is completed, the mistake is discovered. Then, instead of going through the form, for it would be a mere matter of form, of making a new allotment, the machinery which has been stopped is set in motion again, and the matter is completed. It appears to me that the effect of 30 & 31 Vict. c. 131, s. 25, would be to work a great injustice if we were not to decide that these gentlemen are entitled to hold their shares as paid-up shares,

(1) Law Rep. 9 Ch. 554.

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Cotton, L.J.

as they are, and as any creditor might have seen if he had gone and looked at the share register of the company.

COTTON, L.J. :—

I am of the same opinion. The question which we have to decide is, whether these shares are to be considered as having been issued before the 26th of January, that being the day on which the agreement was registered, which provided that they should be treated as paid up some in full and some in part. What is relied on by the official liquidator? It is this. He says there was an allotment on the 19th of January of these shares originally to Mr. *Taylor*, who transferred them to Mr. *Clarke*, and he contends that in consequence of that allotment which was made on the 19th of January, Mr. *Clarke* ought to be considered as holding shares issued before the registration of the agreement. If in fact there was an allotment upon that day, it was an allotment made under an entire mistake, that is to say, it was an allotment made under the supposition that the contract with Mr. *Eaton* had been duly registered, and that consequently the directors had power to allot shares and issue them as fully paid up, and it was made for the purpose of giving effect to that contract. If in fact the shares had been issued on that day, and the shareholder, before the commencement of the winding-up and within a reasonable time after the discovery of the mistake, had come and said that the shares had been so issued under a mistake, and not in accordance with the contract which it was intended to complete, then they would have been entitled, as was decided in *Hartley's Case* (1), to say, "Cancel that issue, take those shares off the register if they have been put there, and issue to us shares which you can now issue after the registration of the agreement in due performance of the agreement." That was not done, because an officer of the company, before the allotment had been in any way acted upon, said to the other officers of the company, "That allotment was intended to be of shares which could be lawfully issued as paid up, but which, if they are issued under the present state of circumstances, cannot be issued as paid up shares; you cannot act upon it. Do nothing further at

(1) Law Rep. 10 Ch. 157.

present. Hold your hand." Consequently, nothing was done in pursuance of that allotment until after the time had arrived when the company could lawfully and effectually issue paid-up shares, and then they were issued. Putting a fair construction upon what was done at the meeting, this was right. What there passed may be regarded as an authority to the officers of the company to issue paid-up shares when and if they could legally and lawfully issue them; and although it may be doubted whether Mr. *Taylor*, the managing director, had any power to interpose and stop the resolution, he had full power to say to the officers of the company, "That resolution under the existing circumstances cannot be acted upon. Do not act on it until the facts enable you to act on it."

That is what he did in effect. Even if there had been a regular resolution to allot these shares, still, in my opinion, it would have been impossible to say that the shares were issued before the registration, when the resolution had been in no way acted upon and nothing done under it until the company was in a position to perform its contract and to issue the shares as fully paid up. But, in fact, what was this so-called allotment? As far as I can ascertain there was no resolution passed to allot. Nothing at all appears on the books, and I take what passed to have been simply this, that whereas under this agreement these shares were to be issued as fully paid up to Mr. *Eaton*, or his nominees, the names of certain persons were given at that meeting as his nominees to whom the shares were to be issued. The names are given by him at the first meeting, and nothing further is done until the company is able to perform its contract by issuing the shares. To guard against any misunderstanding, I wish to state that neither I nor, as I believe, any members of the Court decide this case upon the footing that the issue of certificates is essential for the purpose of shewing that shares have been issued within the meaning of the 30 & 31 Vict. c. 131, s. 25. There are many cases, and *Blyth's Case* (1) is an example, where although no certificates have been issued, yet the transaction is complete—the allottee has become complete master of the shares, and a mere failure to perform the formal act of issuing the certificates does not prevent the shares from being issued within the meaning of

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(1) 4 Ch. D. 140.

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the section. In the present case the resolution was to issue paid-up shares, and nothing was done upon it before the company was in a position legally to issue such shares, and it would be wrong to hold that these shares were issued before registration of the contract.

Judgment,
Thesiger, L.J.

THESIGER, L.J. :—

I am entirely of the same opinion. The only substantial question in the case is whether these shares were issued before or after the contract was registered under the 25th section of the *Companies Act*, 1867. Now, in dealing with that section, there is no magic to be attributed either to an allotment or to the issue of certificates, but in each case the Court must look at all the circumstances of the case, and see whether practically and substantially there has been an issue of shares at a time when there was not a contract registered under the section to which I have referred.

Reliance has been placed on behalf of the Respondents on *Blyth's Case* (1), but that case appears to me clearly distinguishable. There, in the first place, no contract was registered at any time, and the winding-up found the shares registered in the name of the person whom it was sought to make a contributory without there being anything to shew to the public that they were paid up. Next we find that the shares there had not only been allotted, but had been entered on the register in the name of the allottee; and certificates, although they had not been in fact issued to the allottee, were in existence, and had been signed and sealed. In addition to that, there had been dealings with the shares, there had been transfers of the shares, and those transfers had been duly registered in the share register. Here, on the contrary, we start with the fact that the contract was registered under the 25th section. It was registered within a week of the registration of the memorandum and articles of association, and was only not registered upon the same day in consequence of a mistake which was clearly proved by the affidavits which have been placed before us; and we find that although there was an allotment that allotment was made under the *bonâ fide* belief that everything had been duly and properly carried out, and that the agreement, instructions to

register which had been given, had been duly registered. The only thing which can be relied on against these circumstances is that there had been some sort of notice to some of the allottees, and that in one case—if not in two cases—there had been a transfer of shares. But, on the other hand, the transfer undoubtedly took place upon the faith that the agreement had been registered, and that no liability would attach to those who took the shares, except as regards some of them to the extent of one-half of the nominal amount of the shares; and although a transfer in fact took place, it was a transfer of shares which, contrary to the facts which existed in *Blyth's Case* (1), had never been registered in the name of the original allottee, and they were not registered in the name of the transferee until some time after the contract under the 25th section had been duly registered. That being so, it appears to me that *Blyth's Case* is entirely distinguishable, and that the present case comes within the principle of *Bush's Case* (2).

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Solicitors: *Gregory, Rowcliffes, & Rawle; A. D. Smith.*

In re AMBROSE LAKE TIN AND COPPER COMPANY.

TAYLOR'S CASE.

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Rules of Court, 1875, Order LVIII., r. 15—*Extension of Time to appeal.*

A contributory, on the 29th of March, being twenty-one days from the pronouncing of a refusal to remove his name from the list, gave fourteen days' notice of appeal. On the 1st of April, conceiving that he ought to have given only a four-days' notice, he withdrew his notice of appeal, and on the following day gave a four-days' notice of appeal. On the hearing of the appeal, the objection was taken that it was too late:—

Held, that the time ought to be extended.

THIS was an appeal by *Taylor* from a decision of the Vice-Warden refusing to remove his name from the list of contributories of the *Ambrose Lake Tin and Copper Company, Limited*. The merits of the case were precisely the same as those of *Clarke's Case* (3).

(1) 4 Ch. D. 140.

(2) Law Rep. 9 Ch. 554.

(3) *Ante*, p. 635.

Statement.

(1) See *11 M. & W. 108 II* 863.

C. A. The order of the Vice-Warden was pronounced on the 8th of
 1878 March. On the 29th of March the Appellant's solicitors gave a
 TAYLOR'S fourteen-days' notice of appeal. On the 1st of April, conceiving
 CASE. that under Rules of Court, 1875, Order LVIII., rule 4, he ought to
 Statement. have given a four-days' notice only, he wrote to the solicitors of
 the liquidator withdrawing his notice of appeal, and on the follow-
 ing day served a four-days' notice. He did not state in withdraw-
 ing his first notice that he withdrew it merely for the purpose of
 correcting the supposed error.

Argument. *Marten, Q.C., and Northmore Lawrence, for the liquidator:—*

The appeal is too late, as the notice ought to have been served within twenty-one days from the refusal being pronounced: Order LVIII., rule 15. The Respondent has done nothing to mislead the Appellant, and time will not be allowed: *International Financial Society v. City of Moscow Gas Company* (1).

Waller, Q.C., and Bunting, for the Appellant, asked for an extension of time.

Judgment,
 Cockburn, L.C.J.

COCKBURN, L.C.J.:—

We think that this is a case in which, looking at the special circumstances, we may enlarge the time for appealing.

Cotton, L.J.

COTTON, L.J.:—

I put it expressly on this, that notice of appeal had been given within the time, so that it cannot be said that the other side did not know of the determination to appeal, and I think that a withdrawing for a day of the notice ought not to preclude the party from appealing.

Thesiger, L.J.

THESIGER, L.J.:—

In my judgment, the fact adverted to by Lord Justice Cotton makes a very material distinction between this case and the *Moscow Gas Company's* case, upon which reliance has been placed. There the party had allowed the whole of the year to elapse, and he then

found that he had made a mistake, and was just beyond the year. There, if I may use the expression, nothing had been rightly done within the period. Here, undoubtedly, a proper notice was given within the period of twenty-one days. That notice shewed the other side that there was an intention to appeal. Then on the 1st of April that notice, under the mistaken belief that it was an improper one, was withdrawn, and no doubt there was a day during which the Respondent may have been left under the impression that there would be no appeal; but on the next day, the 2nd of April, a fresh notice was given, and therefore I may say that within the period of twenty-one days, and practically from that day down to the time of the appeal being in the paper, the Respondent had full notice that there was an intention to appeal.

On those grounds it appears to me that there are special reasons for allowing this appeal to proceed.

Solicitors: *Gregory, Rowcliffes, & Rawle*; *A. D. Smith.*

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FISHER v. OWEN.

[1877 F. 78.]

✓ *Striking out Interrogatories—Rules of Court, 1875, Order XXXI., r. 5—Interrogatories tending to criminate—Scandal—Irrelevancy.*

An action having been brought to set aside a deed of gift made by a lady a few days before her death, on the ground that the instructions for it were given while she was in a state of stupor produced by large doses of a narcotic drug, the Plaintiff exhibited interrogatories, following out in detail the statements of the claim, with a view of shewing that the Defendant, who was the grantee in the deed of gift, had procured the drug for her and encouraged her to take it, in order to avail himself of the stupor which it produced to obtain the execution of the deed of gift. The Defendant moved to strike out the interrogatories as scandalous, irrelevant, and not put *bonâ fide* for the purposes of the action:—

Held, by *Bacon*, V.C., that the interrogatories inquired after matters amounting to an indictable offence, and must therefore be disallowed.

Held, on appeal, that supposing the matter inquired after to be an indict-

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able offence, that was no reason for striking out an interrogatory, which, being relevant, was not scandalous; and that the remedy of the Defendant was to decline to answer, on the ground that his answer might tend to criminate him.

A party may decline to answer under Rules of Court, 1875, Order xxxi., rule 8, though he might have applied to have the interrogatory struck out under rule 5, and has not done so. The doubt in *Saunders v. Jones* (1) overruled.

The words "or on any other ground" in Order xxxi., rule 5, mean grounds *ejusdem generis* with those specified.

THIS was an action by executors to set aside a deed of gift which had been executed by their testatrix on the 11th of April, 1877, a week before her death. The case made by the Plaintiffs was that the deed, if executed at all by the testatrix, was executed under undue influence of and pressure exerted by her niece and the medical attendant, and while she was in a state of bodily and mental weakness which prevented her from understanding it; and that any instructions she might have given were given while she was in a state of stupor produced by large doses of a narcotic drug, and unable to give any real instructions.

The statement of claim alleged that the testatrix was taken ill in March, 1877. That her niece, who had great influence over her, was then staying as a guest with her, and that none of her four daughters, nor any other relation, was with her. That on the testatrix being taken ill the niece sent to a distance for Dr. B., a medical man, who was not the regular medical attendant of the testatrix, and placed him in attendance on her, and that he remained so till her death. That Dr. B. was an intimate friend of the niece. That on hearing of the illness of the testatrix, three of her daughters came to her house and stayed there till her death, and urged the niece and Dr. B. to call in a medical man in the neighbourhood who had formerly attended the testatrix, but they would not do so. That the testatrix had by her when her daughters arrived a supply of a powerful narcotic drug called nepenthe, which, as the Plaintiffs believed, was procured for her by the niece. That the testatrix was then constantly taking it, and was thereby kept for several days before the 11th of April in a state of almost

(1) 7 Ch. D. 435.

*11. The executors believe Dr. Collier, the widow of the late
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unbroken stupor, and her mind was so confused by it that she frequently did not know what was passing around her or what she was doing. That her daughters remonstrated with Dr. B., and begged him to remove it from her, or at least to take care that she had only small doses of it, but that he refused and neglected to do so. That on the 9th of April the niece and Dr. B. remained almost the whole afternoon in the testatrix's room, and endeavoured to prevent her daughters from coming in. That the testatrix was then in a state of stupor caused by the drug, and was quite incapable of understanding business matters. That on the evening of the 9th of April the niece and Dr. B. went together to *London*, and remained there until the evening of the 10th of April, when the niece returned to the testatrix's house. That on the 11th of April the niece and Dr. B., who had that morning returned from *London* to the house of the testatrix, went to the testatrix's room and remained there for some time alone with the testatrix, who was then in a state of great bodily and mental weakness, so that her death was expected daily. That the testatrix died on the 18th, and some hours afterwards Dr. B. informed her daughters that about a week before she had executed the deed of gift in question, and that it and the policy of insurance thereby assigned were in the custody of his solicitors in *London*. That on the 9th of April the niece and Dr. B. had gone to Dr. B.'s solicitors in *London*, and given them instructions to prepare the deed, which they did, and sent it to Dr. B., and that he and the niece on the 11th procured the testatrix's signature to it. That it was an indenture made between the testatrix of the one part and the niece of the other part, whereby the testatrix assigned a policy for £3000 on her own life to the niece in trust to receive the money, invest it, pay three life annuities, amounting together to £100 a year, and subject thereto retain the £3000 for her own use. That the deed was attested by Dr. B., and that the testatrix had no independent advice about it, and had no communication as to it with any one but the niece and Dr. B. That this policy was the whole of the disposable property of the testatrix. The statement of claim then alleged to the effect mentioned in the first paragraph of this report, and asked to have the deed set aside.

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The niece, who was a Defendant, delivered a statement of defence contradicting all the material statements of the case alleged against her.

The Plaintiffs then delivered interrogatories for the examination of the niece, interrogating her in detail as to all the above statements.

The niece took out a summons to have the interrogatories struck out, on the ground that they were scandalous and irrelevant, and not put *bonâ fide* for the purposes of the action, and were bad in substance.

The summons was adjourned into Court, and was heard before Vice-Chancellor *Bacon* on the 14th of March, 1878.

Argument.

Oswald, for the Defendant:—

The statement of claim contains what amounts to the criminal charge against the Defendant of administering a noxious drug called nepenthe. These interrogatories, being merely the statement of claim turned into the form of interrogatories, are scandalous and irrelevant, and also an abuse of the practice of the Court, and ought to be struck out under Rules of Court, 1875, Order XXXI., rule 5, without the Defendant being put to make her objection to answering them by an affidavit stating the grounds of her objection under Order XXXI., rule 8: *Atherley v. Harvey* (1).

[He was stopped.]

Sir *H. Jackson*, Q.C., and *James Bryce*, for the Plaintiffs:—

These interrogatories, painful as they may be, have a material bearing upon the case alleged in the statement of claim and the relief thereby claimed, and must therefore be allowed. Nothing, however derogatory, that is material to the matter in dispute, and tends to a discovery of the point in question, will be considered as scandalous: *Daniell's Chancery Practice* (2); *Christie v. Christie* (3). If by answering these interrogatories the Defendant would subject herself to a criminal prosecution, that may be

(1) 2 Q. B. D. 524.

(2) 5th Ed. p. 290.

(3) Law Rep. 8 Ch. 499.

good ground for declining to answer them in manner pointed out by Order XXXI., rule 8, but not for striking them out under rule 5, which applies only to interrogatories which are oppressive and irrelevant, and not put *bonâ fide* for the purposes of the trial. If these interrogatories are scandalous, so is the statement of claim; but the Defendant has taken no such objection, and has put in her statement of defence.

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BACON, V.C.:—

If I were to permit such interrogatories as these to be exhibited I should be invading the province of the Criminal Courts. It would be competent, if such interrogatories were allowed, to file a claim against a clerk who had embezzled money, and get an answer from him on his oath, and then take him to the *Old Bailey* and convict him on his own answer. That would be a most inconvenient result with regard to the practice of the Court. Admitting, as I do, that everything relevant to the matter may be protected from the charge of scandal, I do not think that the rule applies to the case before me, because, reading the claim, it is plainly an indictment for a felony or misdemeanor. There is not one word in the interrogatories, in my opinion, which is not both scandalous and irrelevant; and the only thing that can be done in this case is to strike out the whole of the interrogatories, without prejudice to the right of the Plaintiffs to exhibit proper interrogatories.

Judgment,
V.-C. B.

The Plaintiffs appealed. The appeal was heard on the 30th of April.

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Ilbert, for the Appellants:—

Argument.

Order XXXI., rule 8, enables a party interrogated to object to answer, on the ground that answering may criminate him, but that is no reason for expunging the interrogatory. *Voysey v. Cox* (before Mr. Justice *Lindley* in Chambers, January 1st, 1876) shews how the objection ought to be taken. Moreover, nothing is alleged here which would expose the Defendant to a criminal charge. Everything interrogated to is material to the Plaintiffs' case, and it is impossible to say that the interrogatories are scandalous, irrelevant, or not put *bonâ fide* for the purposes of the action.

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This is a matter in which the Court will not interfere with the discretion of the Court below.

[JESSEL, M.R.:—I am not aware of any authority for taking interrogatories off the file because answering them may tend to criminate.]

Eade v. Jacobs (1) is against allowing an appeal.

[COTTON, L.J.:—That was a case of oppressive interrogatories. Here the question is whether the Judge has not exercised his discretion on a wrong ground.]

Atherley v. Harvey (2) is in our favour.

[JESSEL, M.R.:—The Judge there thought that he was following the rule in equity.

COTTON, L.J.:—In some cases the Common Law Divisions have gone on the old common law rule, under which the Court had a discretion whether interrogatories should be administered or not.]

An indictable offence under 24 & 25 Vict. c. 100, s. 23, is charged by the bill. In *Saunders v. Jones* (3), Lord Justice *Baggallay* doubts whether a Defendant can decline to answer an interrogatory on any ground which would justify striking it out.

Judgment, C. A. JESSEL, M.R.:—
Jessel, M.R.

This is an appeal from an order of the Vice-Chancellor *Bacon* striking out the whole of a set of interrogatories as being objectionable under Order XXXI., rule 5, the ground of objection being, not that there was anything objectionable in the interrogatories themselves, but that the answering of them, if the Defendant were compelled to answer, would tend to criminate the Defendant. That is, as nearly as I can give it, the substance of the judgment.

Now, as I understand the rule, it has no application to such a case as this, but applies only to a case where the interrogatory itself is objectionable. The present case, which is one of a painful nature, amounts to this, that the Defendant took advantage of the state of stupor to which a lady was reduced by habitual indulgence

(1) 26 W. R. 159.

(2) 2 Q. B. D. 524.

(3) 7 Ch. D. 435.

in narcotic drugs to obtain a deed of gift from her at a time when she did not understand what she was doing. That is the substance of the case. It is suggested that answering the interrogatories, all of which appear to me pertinent to the issue, may have a tendency to criminate the Defendant, because it is possible that in one view of the case she and the medical attendant may be considered as having procured the drug, though at the request of the testatrix, for the purpose of producing the state of stupor of which they afterwards took advantage. Whether or not that be so, it is not for me now to express an opinion, because I will assume, in favour of the Respondent's contention, that the answering some of these interrogatories would tend to criminate the Defendant. That, however, was no reason why the Defendant might not elect to answer them. I suppose that in the great majority of cases the Defendants would desire to answer charges of this nature, and would answer with indignation, denying every allegation made against them, and therefore it by no means follows that the Defendant will decline to answer the interrogatories. The option to decline to answer them is left open to the Defendant by rule 8 of the same Order, which says, "Any objection to answering any interrogatory may be taken, and the ground thereof stated in the affidavit." Therefore, allowing the interrogatories to stand gives the Defendant the option, first of all, of answering them by denial either more or less complete, or, secondly, of declining to answer, on the ground that the answer may tend to criminate the Defendant. On the other hand, by striking them out you prevent the Plaintiff putting the question. If the Defendant were a witness in the box you could not prevent the Plaintiff putting the question, though the Defendant might decline to answer, and thereby probably subject himself or herself to some disadvantage before the tribunal, whether composed of Judge or Judge and jury; and I do not see what authority we have to prevent the Plaintiff from availing himself of this mode of inquiry of the Defendant without calling the Defendant as a witness. It does not appear to me that the ancient practice of the Court of Chancery on this head has been abolished or interfered with by the *Judicature Act* or by the Orders. If we look at the terms of the Order xxxi., rule 5, we find that everything there

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mentioned is in substance what might be called scandal or impertinence, well-known terms in the old Court of Chancery, with some additional words intended to extend the application of the rule to what is in substance impertinence, though, perhaps, not technically so. It states that an interrogatory may be struck out on the ground that it is impertinent or scandalous, "or is not put *bonâ fide* for the purpose of the action, or that the matter inquired after is not sufficiently material at that stage of the action"—words pointing at cases where there is not technical impertinence, but substantial impertinence. Then the words "or on any other ground" must receive a reasonable interpretation. They cannot have been intended to give a Judge jurisdiction to strike out an interrogatory whenever he thought fit, but must apply to grounds *ejusdem generis*. It winds up, "and the Judge, if satisfied that any interrogatory is objectionable, may order it to be struck out"—that is, that the interrogatory itself is objectionable. As I said before, it is not, and it never was, an objection to an interrogatory that answering it may tend to criminate the Defendant, because allowing an interrogatory leaves the Defendant at liberty to decline answering it on that ground.

It appears to me, therefore, that the order of the Judge below ought not to have been made on the ground on which it has been made, and that that ground being a question of principle, the decision is open to be reviewed. I have read through the interrogatories, and the great bulk of them appear to me to be quite free from objection, and such that, even on the principle stated by the learned Vice-Chancellor, there was no ground on which they could be ordered to be struck out. I am far from saying that where the great majority of interrogatories are open to objection the Judge is not at liberty to order them all to be struck out, leaving the Plaintiff to put in new ones free from objection. I think that in such a case he is not bound to go through them, and to see what small portions of them ought to remain, but may properly exercise his discretion by striking them all out, giving the Plaintiff liberty to set the matter right. But that should only be done where the bulk of the interrogatories is objectionable, or where the objectionable interrogatories are so intermingled with the others that it is difficult to separate them. It appears to me on this ground also

that the order of the Court below ought not to have been made, and that we ought now to discharge it with the costs both here and below.

COTTON, L.J. :—

I am of the same opinion. I will first deal with the contention that we ought not to interfere with the exercise of the Vice-Chancellor's discretion. In the present case the Vice-Chancellor has not gone through the interrogatories, and said, "There is a large part of the interrogatories which I hold, on grounds upon which I can exercise my discretion, to be such as cannot properly be put, and therefore I say they ought to be taken off the file and fresh ones filed;" and we are not reviewing the discretion of the Vice-Chancellor in the sense in which the Court of Appeal in the case referred to declined to interfere with the exercise of the discretion of the Court below. In my opinion the Vice-Chancellor has proceeded upon a wrong principle, and that being so, the discretion was one which he had no power to exercise, and we are bound to review his decision in order to lay down the principle on which the discretion is to be exercised. But I entirely concur in the view that we ought to discourage appeals from the exercise of the discretion of a Judge where he has gone upon a right principle.

The application in the present case was to strike out the interrogatories on the ground that they were scandalous, irrelevant, and not put *bonâ fide* for the purposes of the action. The Vice-Chancellor has gone upon the general principle that, as answering the interrogatories might tend to criminate the Defendant, the Defendant has a right to have them struck out under Order xxxi., rule 5. The applicant clearly thought that he was bringing himself within some of the specified causes in that rule. Can it possibly be said that these interrogatories are scandalous or irrelevant, or not put *bonâ fide* for the purpose of the action? Certainly nothing can be scandalous which is relevant. These interrogatories are relevant, and are clearly put *bonâ fide* for the purpose of establishing the case which the Plaintiff seeks to establish by his action. Was the Vice-Chancellor, then, justified in ordering them to be struck out under the last part of the 5th rule, "or on any other ground"? In my opinion he was not.

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Many of these interrogatories do not tend to criminate, and in my opinion the proper course for the Defendant to take as to those which may tend to criminate was not to ask that they might be struck out, but to insist upon her privilege, if she chooses, when she comes to answer them, as is provided by Order XXXI., rule 8. Reliance was placed on the observations of Lord Justice *Baggallay* in *Saunders v. Jones* (1), but that was merely a doubt, not a decision; and if it is necessary for the Court of Appeal to lay that ghost, I may say that there is no foundation for the opinion that a person who has a ground for refusing to answer is precluded from availing himself of that ground because he has not applied to have the interrogatory struck out, his right to decline answering being expressly reserved to him by the 8th rule.

Then it is said there is an authority in favour of the order of the Vice-Chancellor. In my opinion the case of *Atherley v. Harvey* (2) is no authority in its favour, and even if it were, if we thought it was wrong it would be the duty of this Court, not being bound by that decision (although perhaps the Vice-Chancellor would be), to lay down the correct principle. When, however, we come to look at the case of *Atherley v. Harvey*, it appears that the Judges thought they were following the rule in equity in ordering the interrogatories to be struck out. In my opinion they erroneously applied a rule which did exist in equity, namely, that a bill of discovery in aid of an action for tort was demurrable. That rule has no application where an action is properly brought in a Court which has power to enforce discovery by means of interrogatories. Here an action is commenced in the Chancery Division for the purpose of setting aside a deed of gift, and the statement of claim states facts most relevant for the purpose of setting that deed aside. That being so, the interrogatories are properly filed for the purpose of obtaining aid to the case from the Defendant. If the Defendant thinks that answering will tend to criminate her, there is a well-known way of taking that objection, not by having the interrogatories struck out, but by declining to answer, on the ground that they will tend to criminate her. Therefore, I am of opinion that the principle applied by the Vice-Chancellor is an erroneous one, and that his order must be

(1) 7 Ch. D. 435.

(2) 2 Q. B. D. 524.

discharged with the consequences which the Master of the Rolls has stated.

THESIGER, L.J. :—

I am also of the same opinion. I think that there is nothing in the interrogatories which will justify their being struck out under Order XXXI., rule 5.

In construing these rules it is necessary to see what was the practice in equity and at common law before the passing of the *Judicature Act*. The Master of the Rolls has pointed out what was the practice in equity, and has stated that if a party intended to rely upon his privilege he must do so upon oath in answer to the interrogatories. I think that the rule was the same at common law. It is true that while there have been many cases in which interrogatories tending to criminate have been allowed, there have also been some cases in which such interrogatories have been refused. I think, however, the cases may be reconciled, and may be put upon a broad and intelligible basis, which will be equally applicable to the present as to the old practice. Where you have interrogatories which may tend to criminate, or tend to throw discredit upon the party interrogated, it is the duty of the Court to see in the first place that those interrogatories are put *bonâ fide* for the purpose of assisting the case which is made by the party interrogating; and, secondly, that they are put for the purpose of supporting, not a mere fishing case, but a definite case which is alleged on the pleadings, and which is proposed to be supported in evidence by those by whom those pleadings are put forward. That, it seems to me, was the principle of the decisions at common law.

In *Edmunds v. Greenwood* (1) the Court refused the interrogatories on the ground that they were put by Mr. *Edmunds* for the purpose of criminating the Defendant, and not *bonâ fide* for the purpose of assisting the case.

In *Stern v. Sevastopulo* (2) the interrogatories were disallowed, because they were of a general fishing character, and were not in support of some definite case alleged by the party interrogating, and the Lord Chief Justice *Erle*, in dealing with the question in

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(1) Law Rep. 4 C. P. 70.

(2) 14 C. B. (N.S.) 737

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his judgment, and referring to the cases which appeared to be somewhat conflicting upon the point, reconciled them in this way. He says: "In each of the cases referred to a definite fact was to be inquired into which was material to the case or defence of the opposite party, and in each of them the Court held that the interrogatories might be put, though the answers might tend to disclose the party's own case, or even expose him to the peril of an indictment, in which latter case he might protect himself by declining to answer." Therefore, although in that case the Court held that the interrogatories ought not to be allowed, they at the same time entirely concurred with the view which had been expressed in the other cases, that where an interrogatory, although tending to criminate, is put for the purpose of establishing a definite fact upon which the party interrogating relies, then that party is entitled to have the oath of the person interrogated either in answering the interrogatory or in asserting his privilege not to answer.

That point was dealt with even more clearly in the case of *McFadzen v. Corporation of Liverpool* (1). Mr. Baron *Bramwell* says: "The Court has of course a discretion to say that it will not admit of irrelevant, offensive, or scandalous questions. But we ought not, I think, to allow a question to be shut out only because the opposing counsel says that it is a question which the interrogated party may, perchance, object to answer. In equity any question that is material may be put, and the objection to answer it must be made under the oath of the person objecting, not on the mere assertion of counsel." Here Baron *Bramwell* put the practice at common law as in accordance with the practice in equity. "Therefore, unless we can see clearly that the question is one that ought not to be put, we ought to allow it, and to leave the objection to be taken at the stage of answering." Then Baron *Channell* says: "I am of the same opinion. I think the principle suggested by my Brother *Bramwell* is the fair and right one, and is the principle which is to be gathered from the recent cases. It was not intended by the Legislature that the interrogating party should be shut out from putting any question that is really material to his case. If he goes beyond that, and the Court sees

(1) Law Rep. 3 Ex. 279, 281.

that his questions are put *malâ fide*, or with a vexatious or improper purpose, it will not allow them. But if that is not the case, then the interrogated party should be bound to say upon his oath that he believes his answer will be evidence against him in such a way that he is protected from answering."

That being the position of the practice both in equity and at common law prior to the passing of the *Judicature Act*, it appears to me that there is nothing in that Act which alters the practice upon this particular point, because I agree with what has fallen from the other members of the Court, namely, that it is impossible to say that interrogatories, although tending to criminate or tending to discredit the party interrogated, are scandalous if they are pertinent and material to the case which the interrogating party is setting up.

Then the only remaining question is, whether there are any objections in detail to these interrogatories. Notwithstanding what has been argued by Mr. *Oswald*, it appears to me that they are interrogatories which, according to his account, would have been allowed in equity, they are such as have been put at common law, and are proper interrogatories. They are directed to prove, first, that the person who made this deed of gift had been in the continuous practice of taking this drug so as to put herself in a state of stupor; secondly, that on a particular day, when the instructions for the deed of gift were supposed to have been given, she was in that state of stupor; and, thirdly, that when the deed was executed she was in that state. I find nothing in the interrogatories which affords any ground whatever for the objections which have been made, except, perhaps, that one relating to the conversations. But I think that it may be equally justified with the others. What passed between the doctor and the person who was the beneficiary under this deed of gift upon the occasion of the lady being induced to execute the deed of gift, becomes a most material fact in the case, as proving the allegation in the statement of claim, namely, that the deed was obtained from her when she was in such a state as not to be conscious of what she was doing. There being no one present on that occasion but the persons charged with the conspiracy, it appears to me that an interrogatory calling upon them to state generally the conversa-

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tion which took place may be justified, although as a rule such an interrogatory is objectionable. I am of opinion that the order of the Vice-Chancellor should not have been made, and that this appeal should be allowed.

Solicitors: *Phelps, Sidgwick, & Biddle; Noon & Clarke.*

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[1877 S. 134.]

V.-C. B.
March 22;
April 4.

Enforcing Compromise of Action—Fund set apart to abide Result of Action.

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S. commenced an action in the Common Pleas Division against *D.*, to recover a commission claimed for services in obtaining payment of a sum from a foreign government. This sum was being administered in the Chancery Division, and *S.* commenced an action in that Division to establish a lien on *D.*'s interest, and to prevent the fund from being paid away. In this action an order was made for a sum of £5000 to be set apart in the joint names of the solicitors of the Plaintiff and Defendant to answer the Plaintiff's claim, and all further proceedings were stayed until after the trial of the action in the Common Pleas Division, and general liberty to apply was given. Shortly after this the solicitors of the Plaintiff and Defendant, by the authority of their clients, came to a definite arrangement by letter as to the amount of the Plaintiff's claim. The Plaintiff then applied for directions that this amount might be paid to him out of the fund set apart:—

Held, by *Malins*, V.C., that the Court had no authority to make such an order, as it would thereby be enforcing a compromise of an action in the Common Pleas Division, but *held* on appeal that the Court had jurisdiction to make the order.

Statement.

LORD DUNDONALD, having considerable claims against the Brazilian Government in respect of services rendered by his father, the late Lord *Dundonald*, employed Mr. *Scully*, who was resident at *Rio*, to come to an arrangement with the government on his behalf, and it was agreed that Mr. *Scully* should receive a commission of 12½ per cent. out of the sum recovered.

A sum of about £40,000 was ultimately received from the Brazilian Government, but Lord *Dundonald* disputed its having been in any degree recovered through Mr. *Scully*'s exertions, and declined to pay any commission.

On the 13th of April, 1875, *Scully* commenced an action in the Court of Common Pleas against Lord *Dundonald* to recover £5037, the amount claimed for commission. The sum paid by the Brazilian Government was administered in the Chancery Division in a suit of *Cochrane v. Lord Dundonald*, and in the early part of 1877 an order was made by Vice-Chancellor *Malins* for distribution of the fund. After some negotiation about setting apart a sum of £5100 to meet the Plaintiff's claim, the Plaintiff on the 12th of April, 1877, issued a writ against Lord *Dundonald*, praying a declaration that the Plaintiff was entitled to a charge to the extent of £5100 upon certain moneys, amounting to £10,643 or thereabouts, standing in Court to the credit of *Cochrane v. Lord Dundonald*, to which Lord *Dundonald* was entitled under an order in that cause, by way of security for £5037, or other the amount which might be recovered by the Plaintiff in the action in the Common Pleas, and to have such sum of £5100 set apart, and an injunction to restrain Lord *Dundonald* from receiving or dealing with such moneys without first providing thereout or otherwise the £5100.

An injunction was moved for, and on the 26th of April, 1877, the following order was made :—

“The Defendant by his counsel undertaking within three days after the receipt by him of the fund mentioned in the said writ of summons, as being in Court to the credit of the cause of *Cochrane v. Earl of Dundonald*, to pay into a *London* bank, to be agreed upon between the solicitors of the Plaintiff and Defendant, to the joint names of *Charles Burt* and *Joseph Harris Stretton*, the sum of £5100 to abide and answer the Plaintiff's claim for £5037 in the said writ mentioned, such undertaking to be without prejudice to any question, This Court doth order that all further proceedings in this action be stayed until after the trial of a certain action now pending in the Common Pleas Division of the Court, wherein the above-named Plaintiff is Plaintiff, and the above-named Defendant is Defendant. And it is ordered that the costs of this motion be reserved until the trial of this action. And all parties are at liberty to apply.”

On the 18th of May, 1877, a sum of £5100 was in pursuance of

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this order deposited in the *London and Westminster Bank* in the names of *Burt* and *Stretton*.

In December, 1877, interviews took place between Mr. *Stretton*, as solicitor of Lord *Dundonald*, and Mr. *Burt*, as solicitor of the Plaintiff, with a view to a compromise, after which the following letters passed:—

Dec. 19. *Stretton* to *Burt*:—

“Understanding from you that you will recommend your client to compromise this action on receipt of £2000 and costs as between solicitor and client, the latter to be agreed with me, I am prepared with a view to put an end to the litigation to recommend and now make such an offer, which I hope will be accepted.”

Dec. 21. *Burt* to *Stretton*:—

“I have your note of yesterday, upon which I will write to my client. His last instructions to me were not to compromise for less than £4000. His views perhaps may be now changed. You do not say for how long your offer is open. I suggested to you that you must give me time to write to *Rio* and get a reply, say two months. I suggested also that your offer had better be £2500 to include costs, and as there has been a considerable expense in *Rio* by reason of the commission, I do not think you will lose much, if anything, by the alteration, whilst it would enable me to put the matter more effectually to the Plaintiff.”

Dec. 21. *Stretton* to *Burt*:—

“I am obliged by yours of this date. I would rather not vary my offer, except so far as to give you two months’ time for acceptance, which I omitted inadvertently in my former letter.”

Jan. 18, 1878. *Burt* to *Stretton*:—

“I have received from Mr. *Scully* a telegram authorizing me to accept £2000 with all expenses, including £250 expenses at *Rio*. I have had our draft bill made out, and find that the items amount as nearly as possible to £350. I am therefore prepared to settle the action on payment of £2600. The security for costs in Court to be returned to us, and judgment in the action given for the above sum. Proceedings in Chancery to be stayed.”

Feb. 1, 1878. *Stretton to Burt*:—

“My client positively declines to go beyond my offer, which he construes as limited to £2000 and your firm’s costs.”

Feb. 14, 1878. *Burt to Stretton*:—

“I have now received a letter from my client which enables me to close this matter. I therefore accept the offer contained in your letters to me of the 19th and 21st of December, 1877, and shall be prepared to meet you and go through and agree the costs whenever you are ready to do so.”

After this several meetings took place about the bill of costs, which was substantially agreed to.

On the 20th of February, 1878, Mr. *Stretton* wrote to Mr. *Burt* as follows:—

“I have just had a communication from my client saying that he considered the negotiations for a compromise terminated by your letter of the 18th of January, to which I replied on my return from *Ireland* on the 1st of February. In the meantime considerable expense has been incurred on his part, owing, among other things, to Mr. *Hunt* having been brought over to this country. Under these circumstances I am unable to proceed further.”

The Plaintiff then gave notice of motion before Vice-Chancellor *Malins* that *Burt* and *Stretton* might be at liberty, and that the Defendant might be ordered to concur with the Plaintiff in requesting them, out of the moneys deposited in their names under and subject to the directions of the order of the 26th of April, 1877, to pay to the Plaintiff, or his solicitor on his behalf, the sum of £2000 and the amount of the costs, as between solicitor and client, of the Plaintiff in the action of *Scully v. Lord Dundonald* mentioned in the order, and of the present action, the Plaintiff offering to concur in such request, and upon such payment being made, to request and authorize *Burt* and *Stretton* to pay over to the Defendant the residue of the moneys, or that otherwise the order of the 26th of April, 1877, so far as it stayed proceedings in the action, might be discharged, and that the Plaintiff might be at liberty to proceed in the action and to amend the writ. The

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C. A. motion was heard before Vice-Chancellor *Malins* on the 22nd of  
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*J. Pearson*, Q.C., and *Beaumont*, for the Plaintiff, in support of the motion:—

The compromise we now seek to enforce was entered into by the solicitors on each side. It was proposed by Lord *Dundonald's* solicitor and accepted by ours, and from the correspondence it is clear that Lord *Dundonald* was aware of the terms proposed. There is evidence of an agreement entered into by Lord *Dundonald* to pay Mr. *Scully* 12½ per cent. upon the amount which should be obtained from the Brazilian Government, and the action by Mr. *Scully* for that sum, which would be about £5000, was fairly compromised by the offer to pay £2000 and costs. If the Court is satisfied from the evidence and correspondence that Lord *Dundonald* sanctioned the course taken by his solicitor, then the compromise ought to be enforced, as your Lordship decided in *Holt v. Jesse* (1) and in *Pryer v. Gribble* (2). That case was afterwards appealed and the decision reversed on the ground that the agreement for a compromise could not be enforced upon motion in a suit, but that a fresh bill must be filed. That, of course, was decided under the law as it stood before the *Judicature Act*, but now by the Act of 1873 (36 & 37 Vict. c. 66, s. 24, sub-s. 7), the Court has power to grant such remedies as the parties are entitled to without the institution of a fresh suit. This was decided by Vice-Chancellor *Hall* in *Eden v. Naish* (3), in which his Lordship followed an unreported case of *Hakes v. Hodgkin*, decided by the Master of the Rolls.

*Higgins*, Q.C., for the Defendant:—

The answer to this application is, first, that there really never were any definite terms of compromise agreed upon. An offer was made by Lord *Dundonald's* solicitor to Mr. *Scully's* solicitor. The latter required some further concessions, and the matter was referred to the Plaintiff to ascertain whether he was willing to accept the proposed terms. In the meantime, when Lord *Dun-*

(1) 3 Ch. D. 177.

(2) Law Rep. 10 Ch. 534.

(3) 7 Ch. D. 781.



*donald* was made fully aware of what his solicitor had proposed, he declined to accede to the arrangement. A client cannot be bound by a compromise effected by his solicitor, unless with his entire sanction, and there is Lord *Dundonald's* statement that he never did give his sanction.

Then as to the form of this application, the cases cited do not apply, because in those cases the actions in which the compromises were made were actually pending before the Court, but here you are asked to enforce a compromise of an action in the Common Pleas. The order made by your Lordship in April, 1877, was that £5000 should be deposited in the names of the solicitors, to abide the decision in the Common Pleas, and all further proceedings in this suit were stayed until the trial of the common law action. And in the cases cited the application was by the person who had to pay the money, and not by the person who was to receive it. On these grounds it is submitted that the Court has no power to make the order asked.

MALINS, V.C.:—

It appears that by the order made by me in April, 1877, the sum of £5000 was ordered to be deposited in the names of the solicitors, and that all further proceedings in this action should be stayed until after the trial of the action in the Common Pleas Division. The meaning of that I take to be until after the termination of the action. So that an action cannot be considered as tried until the trial has taken place, or that which the parties choose to substitute for the trial, viz., an agreement for compromise. But I think the true meaning of it is,—after the final ending of the action by judgment, or by compromise, or otherwise, and then the parties are at liberty to apply.

Now, in this state of things, it appears that on the 19th of December, 1877, Mr. *Stretton*, of the firm of *Newman, Hilliard, & Stretton*, writes to Mr. *Burt*, the Plaintiff's solicitor, offering to compromise the suit on payment of £2000, "with costs as between solicitor and client, the latter to be agreed with me." Further correspondence took place, in which some deviation from the terms was proposed by Mr. *Burt*, but it was arranged that two months should be allowed for a communication to be made with

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the Plaintiff. The two months would extend to the 21st of February in this year. Meanwhile a communication had taken place between Mr. *Stretton* and Lord *Dundonald*, and on the 1st of February Mr. *Stretton* writes, "My client, Lord *Dundonald*, positively declines to go beyond my offer, which he construes as limited to £2000 and your firm's costs.

Now I do not think it satisfactory for any counsel, or any solicitor having been party to a compromise, to endeavour to set that compromise aside. I am satisfied of this, that Lord *Dundonald* had authorized a negotiation, and if a man gives a solicitor a general authority to enter upon negotiations for a compromise, unless he puts an express restriction upon the solicitor, that is an authority to the solicitor to conclude any compromise which he thinks fit; but I am satisfied also not only that Lord *Dundonald* authorized a general negotiation for a compromise, but that he perfectly well knew what had been agreed between Mr. *Stretton* and Mr. *Burt*—that the sum to be paid on that compromise was £2000, with the Plaintiff's costs.

Under these circumstances, I regret that Lord *Dundonald* should have repudiated the bargain that was deliberately entered into, and which ought to be binding upon him. It was a compromise fairly and honourably entered into by solicitors of great experience on each side, and when such arrangements are made the Court can never look upon an attempt to repudiate them without the greatest disfavour.

But still, it being my opinion that this is a compromise which ought to be binding on Lord *Dundonald*, and I cannot express my opinion too decidedly that he ought to fulfil it, the question I have to decide is whether I can compel him to do so, and I am sorry to say that in this stage of the proceedings I am obliged to come to the conclusion, upon the form of the order, that I cannot, for this is a compromise of the action proceeding between Mr. *Scully* and Lord *Dundonald*, which was an action in the Court of Common Pleas. My order is that all proceedings in this cause shall stand over until after the trial, which I have already said means after the conclusion of all the proceedings in the action, and then there was liberty to apply. Many technical points have been raised against the validity of this compromise. Amongst other things, it

is said that a solicitor has no power to bind his client by a compromise. As a general rule, that is true; the solicitor in the absence of his client cannot bind him by a compromise. But a solicitor can bind him, and counsel can bind a client by a compromise when that is expressly sanctioned by the client himself. That point I decided in *Holt v. Jesse* (1), where I should have been obliged to come to the conclusion that the compromise entered into before me by the counsel and solicitors would not have been binding on Mr. *Jesse* but for the fact of Mr. *Jesse* also authorizing his counsel and solicitor to do the very thing which they did. Therefore I did not decide that the solicitor could not bind his client, but that what the party himself, his counsel and solicitor did, would bind him when they had his express authority in Court at the time. I have said what the rule is, and as a rule I suppose it had better so remain, that without express authority the solicitor cannot bind his client. But in this case I am satisfied Lord *Dundonald* not only knew of the negotiation that was going on, but knew it had been agreed to give £2000, and had also sanctioned that arrangement, and therefore it is that I am of opinion that he ought to feel himself bound by it; and if I had to decide this case I should decide that Lord *Dundonald* is bound to carry it out, and, moreover, I should certainly decide it in this form of proceedings, and should follow the decisions of the Master of the Rolls and Vice-Chancellor *Hall* in the case which has been referred to, of *Eden v. Naish* (2), where the Vice-Chancellor followed the decision of the Master of the Rolls in *Hakes v. Hodgkin*. There the Master of the Rolls decided, and in *Eden v. Naish* the Vice-Chancellor *Hall* decided, that where there is a compromise in an existing suit, the terms of that compromise can be enforced by a separate order in the suit, without having recourse to filing another bill or commencing another action to enforce the terms of the compromise. That was a decision I thought, and which I think still, even before the *Judicature Act*, would be proper for the Court to arrive at, and I accordingly so decided in *Pryer v. Gribble* (3), where my judgment is given in a note. That went to the Court of Appeal, and their Lordships thought otherwise, and

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(1) 3 Ch. D. 177.

(2) 7 Ch. D. 781.

(3) Law Rep. 10 Ch. 534.

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that it was necessary to have another suit. The consequence was the parties had two more years of litigation, the property went to decay, and they greatly suffered in consequence of the delay and further litigation, and at last it came back to me, and after two years' delay they did exactly what I had decided two years before.

Now, however, there is an alteration in the practice, and I beg to express my entire concurrence with the decisions of the Master of the Rolls and Vice-Chancellor *Hall*, and wherever parties enter into an agreement to compromise a suit pending before me I shall consider it pure matter of course that an order shall be made in that suit to enforce the compromise. I entirely dissent from the argument of Mr. *Higgins*, that it is only where the Plaintiff has to pay something. It is equally binding whether the Plaintiff or Defendant has to pay or to receive, and therefore I cannot accede to the distinction he drew that there it was the Plaintiff who had to pay something.

Under these circumstances, upon every principle, being, as I am, against Lord *Dundonald* in this matter, can I enforce the compromise in this suit? In the cases decided by the Master of the Rolls and Vice-Chancellor *Hall* it was a compromise of the very suit before him. This matter is a compromise of an action pending in the Court of Common Pleas. I have ordered this cause to be stayed until the trial of that action is concluded. Can I say that that action is concluded? This is either a binding compromise, or it is not. If it is a binding compromise, I take it to be perfectly clear that the Court of Common Pleas has just the same power to enforce the compromise of an action pending before it as the Master of the Rolls, the Vice-Chancellor *Hall*, or myself, or any co-ordinate Judge, of enforcing it in this Court. If, therefore, Mr. *Scully* can make out that Lord *Dundonald* has compromised that action, which is for £5000, on the terms of paying £2000 and costs, it appears to me unnecessary to follow the course which I should have done if it had been an action pending before me. But the Plaintiff can have it decided in a summary manner, because I take it the summary manner will be that the Judge of the Court of Common Law will order judgment to be entered against the Defendant for £2000 and costs, as arranged. That, I



think, is the step which ought to be taken; but instead of that, the motion before me is that I should enforce a compromise of the action in the Common Law Division. That I am unable to do. I have no jurisdiction, I am sorry to say, because the form of the order is that all proceedings in this cause are to be stayed until after the trial, which I say is after the final determination of the action in the Court of Common Pleas.

On that technical point, therefore, I regret that I am obliged to come to a conclusion against the Plaintiff, and I cannot, therefore, accede to this motion. But if the Court of Appeal, which has power, can take a different view and enforce this compromise, I should be very glad to hear that they have done so. It is on a purely technical ground. Mr. *Higgins* says they never agreed exactly upon the same terms. I think they have agreed so nearly to the same terms that I do not think it creditable to any of the parties, when they have agreed for £2000 and "your firm's costs," to attempt to say the terms are not settled. Therefore, I leave the matter open for the Court of Common Law to say whether judgment will now be entered for Mr. *Scully* for the sum of £2000 and costs. If the Court of Common Pleas so decides, you will have only to come with that judgment and ask me to order—and, as a matter of course I shall order—Mr. *Burt* on one side, and Mr. *Stretton* on the other side, to pay such sum of money as is mentioned in the judgment to Mr. *Scully*, and the balance to Lord *Dundonald*. That application will be disposed of in Chambers, and this motion I must dismiss; but as I think it most unwarrantable, I shall not give any costs.

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The Plaintiff appealed. The appeal was heard on the 30th of April.

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*J. Pearson*, Q.C., and *Beaumont*, for the appeal:—

Argument.

The Court can now enforce a compromise on a summary application: *Eden v. Naish* (1). The parties have settled the amount of the claim, and a trial of the action in the Common Pleas Division has become impossible. We have a lien on the fund for the amount, the fund has been set apart under an order of the

C. A. Court to meet it, and the amount having been settled, we have a  
1878 right to apply for payment.

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*Higgins*, Q.C., for the Defendant:—

We say that on the evidence there was no agreement, for that the solicitors had only power to enter into a provisional contract, to be confirmed by their principals. If there was an agreement to compromise, we say that there was no jurisdiction to enforce it on motion: *Pryer v. Gribble* (1).

[JESSEL, M.R.:—In that case there was no fund set apart to abide the order of the Court. Here there is an assignment of the fund by the letters.]

That does not remove the objection to enforcing a compromise on motion, and the *Judicature Act*, 1873, s. 24, sub-s. 7, does not help the case.

[JESSEL, M.R.:—If the compromise involves nothing beyond the questions raised in the suit, why may it not be enforced on motion?]

*Askew v. Millington* (2) decides that it cannot.

Judgment, C. A.  
Jessel, M.R.

JESSEL, M.R.:—

This appeal is hardly an appeal from the opinion of the Vice-Chancellor, for he was in favour of the Appellant except on one small point, viz., whether he was bound to put a narrow construction on the order he had made. To that extent I differ from the Vice-Chancellor. Substantially the order was an order to set apart a sum of money to answer the Plaintiff's claim. The Plaintiff having brought an action to establish a lien on Lord *Dundonald's* interest in a fund, the sum, instead of being set apart in the action, was ordered to be paid to two solicitors to answer the Plaintiff's claim, and all further proceedings in the action were stayed with liberty to apply. The stay of proceedings was in form until a certain action pending in the Common Pleas Division had been tried, but the substance of the order was to set apart a fund until the claim was determined, whether by trial of that particular action or otherwise. The liberty to apply is general, and must be

(1) Law Rep. 10 Ch. 534.

(2) 9 Hare 65.

treated as authorizing an application on the happening of any event which settled the right of the parties. What has happened is that the parties have agreed on the amount of the claim. Such an agreement for compromise is within the purview of the order, which appears to me to be wide enough to enable us to do justice. I agree with the Vice-Chancellor that there is a clear agreement by letter for payment of a certain sum, and I do not find that Lord *Dundonald* denies his agent's authority to bind him. Terms sufficiently definite were agreed upon, and the matter in dispute between the parties was thus settled.

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COTTON, L.J.:—

Cotton, L.J.

I am of the same opinion, and have only to add that it is important that it should be understood on what grounds we put our decision. I do not rely on the provisions in the *Judicature Act*, which merely enable the Court in which an action is brought to stay proceedings in that action without a bill in cases in which before the Act they might on a bill filed have been stayed by injunction. That is not this case. Here under an order a sum was set apart, in form to abide the result of a particular action, but in substance to abide the result of the Plaintiff's claim however determined. At the time when the order was made it was considered that the action would go on, so the order took that form, but that does not affect the substance of the case. The Plaintiff's claim has been established not by trial of the action but by agreement between the parties, and it would be unfortunate if we were obliged to say that the action must go on to decide what has been already settled by the parties themselves. The letter of the 14th of February, 1878, clearly accepts the offer contained in *Stretton's* letters of the 19th and 21st of December, 1877, and the amount of the Plaintiff's claim is thus settled. The fund has been set apart under an order of the Court to answer that claim, and we ought not to require the parties to proceed with further litigation.

THESIGER, L.J.:—

Thesiger, L.J.

I am entirely of the same opinion. The Plaintiff has established a definite agreement by Lord *Dundonald* to pay £2000 and costs in satisfaction of the claims against him. *Scully* by his

C. A. action in the Chancery Division claimed a lien on the fund.  
 1878 Had there not been any action in the Common Pleas Division,  
 ~~~~~  
 SCULLY the whole matter would have been tried in the action in the
 v. Chancery Division, but there being an action already proceeding
 LORD in the Common Pleas Division, it was thought better that the
 DUNDONALD. claim should be disposed of there, and the order of the 26th of
 Judgment, C. A. April, 1877, was therefore made in the form in which we find it,
 Thesiger, L.J. staying proceedings till after the trial of the action in the Common
 ~~~~~ Pleas Division. Instead of that action being tried the claim was  
 settled by the parties. This seems to be within the terms of the  
 last part of the order, for unless the claim being settled gives the  
 parties a right to apply, they never could apply at all, since after  
 such settlement there is no way of bringing the action in the  
 Common Pleas Division to decision. I agree therefore that the  
 Court had jurisdiction to make the order asked for by the Plaintiff.

Solicitors for Plaintiff: *Bircham & Co.*

Solicitors for Defendant: *Newman, Stretton, & Hilliard.*

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### HUSSEY v. HORNE-PAYNE.

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[1877 H. 275.]

V.-O. M.

April 2.

*Vendor and Purchaser—Contract—"Subject to the Title being approved by our Solicitors"—Waiver—Abandonment.*

C. A.

April 30.

The Defendant made an offer by letter to sell an estate to the Plaintiff, which offer the Plaintiff accepted by letter, "subject to the title being approved by my solicitor." After this the Plaintiff wrote to say that he must abandon the purchase unless he was allowed to pay the money by instalments. The Defendant assented to payment by instalments. Shortly afterwards the Plaintiff's solicitor brought to the Defendant's solicitor a paper embodying the terms as to payment, and headed, "Proposal by T. H. for purchase of the M. Estate." The Defendant's solicitor verbally agreed to these terms, and arranged to instruct his counsel to prepare an agreement on the basis of them, but no such contract was prepared. The Defendant having afterwards declined to complete, the Plaintiff brought his action for specific performance, and the Defendant demurred to the statement of claim. On the argument in the Court below, it was taken for granted that the two letters made a binding contract:—

*Held, by Malins, V.C., that the negotiations as to payment by instalments*

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did not amount to an abandonment by the Plaintiff of the original contract, and that the demurrer must be overruled.

*Held*, on appeal, that the words "subject to the title being approved by my solicitor" were not merely an expression of what would be implied by law, but constituted a new term; that the Plaintiff's letter, therefore, was not an acceptance, but a new offer which had never been accepted, and that there was no binding contract.

*A.* wrote to *B.* offering to sell him an estate for £37,500, or a part of the estate for a less sum, and added a postscript reserving the right to remove the materials of a house. *B.* replied: "I beg to acknowledge the receipt of your letter stating that you are willing to accept £37,500 for the whole of your freehold land at *N.* I hereby accept your terms as above, and agree to pay you the said sum of £37,500 for your land":—

*Held*, by *Jessel*, M.R., that this was an acceptance of the terms in *A.*'s letters, including the postscript.

*aff 42/100 3/4 14/2*  
THIS was a demurrer to the statement of claim in an action for the specific performance of a contract for the purchase of the *Mornington* estate, *North End, Fulham*, consisting of seventeen acres.

Statement.

The statement of claim alleged that, in the autumn of 1876, the Plaintiff, through his agent, *Weaver*, was in negotiation with the Defendant, *Mrs. Horne-Payne*, for the purchase of the estate to which she claimed to be absolutely entitled for her separate use, and that the negotiation culminated in the agreement contained in the two following letters from *Mrs. Horne-Payne* to *Weaver*, and from *Weaver* to her:—

"4th Oct., 1876.

"Dear Sir,—I cannot accept your offer of £35,000 for my freehold land at *North End*. I refused that sum for it fifteen months ago when offered by Messrs. *Willett* through Messrs. *Saunders*. I am now willing to divide the difference between your offer and my price, and I am prepared to accept £37,500 for the entire freehold property, or £34,500 for the property without the *Mornington House* and  $1\frac{1}{2}$  acre of ground.

"I am, dear Sir, faithfully yours,

"*Geo. M. Horne-Payne.*

"*W. Weaver, Esq.*"

"P.S.—I shall withhold the right of removing the new materials used in rebuilding *Mornington House*, and all fixtures, &c., &c.

"*Geo. M. Horne-Payne.*

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C. A. *Weaver*, on the 6th of October, replied as follows:—

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“I beg to acknowledge the receipt of your letter of the 4th inst. stating that you are willing to accept the sum of £37,500 for the whole of your freehold land at *North End* (including the *Mornington House* estate), and I hereby, on behalf of Mr. *Thomas Hussey*, of 96, *Kensington High Street*, accept your terms as above, and agree to pay you the said sum of £37,500 for your land as aforesaid, extending from *Hammersmith Road* to the *Hammersmith Railway*, subject to the title being approved by our solicitors.”

The statement of claim further alleged that in the course of the negotiations which resulted in the above letters Mrs. *Horne-Payne* had suggested that it would be for the convenience of both parties that the purchase-money should be paid by instalments, and that the Plaintiff assented, and accordingly allowed arrangements which he had made for providing the purchase-money to fall through. That on the 12th of October, 1876, the Plaintiff, his solicitor, and Mr. *Weaver* had a meeting with Mr. *Crowdy*, Mrs. *Horne-Payne's* solicitor, at which she failed to attend, and that Mr. *Crowdy* stated that nothing but the immediate payment of a deposit of £10 per cent. and the payment of the residue in a few months would be accepted. That the Plaintiff, considering himself to have been unfairly treated, directed his solicitors to write, and they, on the 24th of October, 1876, wrote to Mr. *Crowdy* that, as he stated that he could make no other arrangement for payment of the purchase-money except 10 per cent. as a deposit, and the balance in a few months, Mr. *Hussey* had no option but to decline the matter, and as soon as Mr. *Crowdy's* client should be prepared to treat upon the footing of payment by instalments extending over about three years, they would be prepared to negotiate again on Mr. *Hussey's* behalf.

That on the 25th of October Mrs. *Horne-Payne* wrote to Mrs. *Weaver*, saying that she had given Mr. *Crowdy* instructions to accept the offer to pay by instalments in three years and the deposit down.

That on the 31st of October the Plaintiff's solicitor received from Mr. *Crowdy* a letter containing terms on which Mrs. *Horne-Payne* was willing to carry out the sale, and that as the terms so

stated were nearly identical with those agreed upon between Mrs. *Horne-Payne* and *Weaver*, the Plaintiff's solicitor, on the 14th of November, called on Mr. *Crowdy* and left with him a statement of terms (headed "Proposal by *Thomas Hussey* for the purchase of the *Mornington Estate*") as to the payment of the purchase-money, and Mr. *Crowdy* verbally agreed thereto, and arranged to instruct his counsel to prepare a formal contract on the basis thereof. No such contract was, however, prepared.

The Defendants having declined to complete the sale to the Plaintiff, the Plaintiff now claimed specific performance of the contract contained in the two letters of the 4th and 6th of October, and a declaration that the terms left with Mr. *Crowdy* on the 14th of November were binding on the parties as a valid interpretation of the original contract, and specific performance thereof accordingly.

The demurrer was heard before Vice-Chancellor *Malins* on the 2nd of April, 1878.

*Bristowe*, Q.C., and *Bush*, for the demurrer:—

Assuming that the letters of the 4th and 6th of October constituted a contract, it is clear by the letter of the 24th of October and the new proposal of the 14th of November, that the parties afterwards considered that there was no concluded contract. The mode of payment of the purchase-money was not settled, but was still matter of negotiation. The new negotiations cannot be reconciled with the fact of there having been a previous concluded contract. These negotiations never ripened into any contract, and there is nothing of which there can be specific performance, for the proposals of the 14th of November were to be submitted to counsel by the Defendants' solicitor: *Chinnock v. Marchioness of Ely* (1); *Rossiter v. Miller* (2); *Winn v. Bull* (3).

*Glasse*, Q.C., *Pearson*, Q.C., and *Pope*, for the Plaintiff:—

There was a complete contract concluded by the letters of the 4th and 6th of October. The subsequent negotiations as to the mode of payment of the purchase-money by instalments left the

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(1) 4 D. J. & S. 638. *11 M. & S. 229* (2) 5 Ch. D. 648.

(3) 7 Ch. D. 29.

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contract for sale and purchase as it was. Equal formalities are required to rescind a concluded contract as to conclude it. Lord *St. Leonards* (1) says, "an agreement to waive a purchase contract is as much an agreement concerning lands as the original contract." There must be as clear evidence of the waiver as of the existence of a contract: *Carolan v. Brabazon* (2). Negotiations subsequent to a concluded contract need not amount to an abandonment of it: *Robinson v. Page* (3); *Price v. Dyer* (4); *Moore v. Campbell* (5); *Noble v. Ward* (6).

*Bristowe*, in reply:—

*Robinson v. Page* is in the Defendant's favour, for the circumstances here shew that there was an absolute abandonment of the contract.

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MALINS, V.C.:—

The offer of the 4th of October was unconditionally accepted in all its terms by the letter of the 6th of October, and formed a concluded contract, and there being no stipulations as to the mode of paying the purchase-money, it would have to be paid in the ordinary way.

Mr. *Hussey*, by his letter of the 24th of October, abandoned the contract unless the Defendants would waive the immediate payment of the purchase-money, and allow him to pay it by instalments, but they declined to abandon the contract, and on the 25th of October conceded the payment by instalments.

The subsequent negotiations between the Plaintiff and Mr. *Crowdy* as to the mode of payment of these instalments give some colour to the Defendant's argument, especially as the terms offered by the Plaintiff's solicitor on the 14th of November are headed "Proposals for purchase," but the solicitors had no authority to abandon the original contract and make a new one.

There is nothing, in my opinion, in all these negotiations to rescind the original contract, and the authorities confirm my opinion. Lord *St. Leonards*' statement of the law in his Concise

(1) Sug. V. & P. 14th Ed. p. 167.

(2) 3 J. & Lat. 200, 209.

(3) 3 Russ. 114.

(4) 17 Ves. 356.

(5) 10 Ex. 323.

(6) Law Rep. 1 Ex. 117; *Ibid.* 2 Ex. 135.

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View, one of the best of his works, is that a contract can only be abandoned by as formal an agreement as that which constituted the contract; and the case of *Noble v. Ward* (1) and *Robinson v. Page* (2) shew that subsequent attempts to arrange the payment of the purchase-money do not amount to an abandonment of the original contract. The demurrer must be overruled on the usual terms.

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The Defendant appealed. The appeal was heard on the 30th of April.

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*Bristowe*, Q.C., and *Bush*, for the Appellant, in addition to the arguments urged below, contended that the terms introduced by the postscript had not been accepted, and that the words "subject to the title being approved by our solicitors" introduced a new term: *Hudson v. Buck* (3), and that there never was any binding contract.

Argument.

*Glasse*, Q.C., and *Pope*, for the Plaintiff:—

*Hudson v. Buck* does not govern this case, the words here being more general. We contend, moreover, that the decision in that case cannot be sustained, for that the words fairly understood mean nothing more than "provided a good title is shewn," which is nothing more than what would be implied by law.

JESSEL, M.R.:—

Judgment, C. A.  
Jessel, M.R.

This is an appeal from the decision of Vice-Chancellor *Malins* on a demurrer to a claim for specific performance of a contract. The only question upon which I am about to give an opinion is, whether or not two letters which are set out in the first and second pages of the statement of claim amount to a contract. The point on which I am about to decide the case, so far as I am concerned, is one which was not argued before the Vice-Chancellor, and we have not therefore the advantage of any judgment of his upon it.

The statement of claim alleges that the Defendant, Mrs. *Horne-Payne*, was entitled for her separate use to some freehold land

(1) Law Rep. 1 Ex. 117; Ibid. 2 Ex. 135.  
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(2) 3 Russ. 114.

(3) 7 Ch. D. 683.

C. A. called the *Mornington Estate, North End, Fulham*, and these letters are alleged to amount to a contract for the sale of that estate to the Plaintiff for £37,500. The offer made to the Plaintiff of the estate at that price was a simple offer containing no reference whatever to title. The alleged acceptance was an ac-

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ceptance of the offer, so far as price was concerned, "subject to the title being approved by our solicitors." There was no acceptance of that additional term, and the only question which we are called upon to decide is, whether that additional term so expressed amounts in law to an additional term, or whether it amounts, as was very fairly admitted by the counsel for the Respondents, to nothing at all, that is, whether it merely expresses what the law would otherwise have implied. The expression "subject to the title being approved by our solicitors" appears to me to be plainly an additional term. The law does not give a right to the purchaser to say that the title shall be approved by any one, either by his solicitor or his conveyancing counsel, or any one else. All that he is entitled to require is what is called a marketable title, or, as it is sometimes called, a good title. Therefore, when he puts in "subject to the title being approved by our solicitors," he must be taken to mean what he says, that is, to make it a condition that solicitors of his own selection shall approve of the title.

The matter has been recently and fully discussed by Mr. Justice Fry in *Hudson v. Buck* (1), and as I entirely agree with his observations on the nature of the condition, it is unnecessary for me to repeat them. The result, therefore, is, that there is no contract.

I am not satisfied that the Appellant could succeed upon the other grounds alleged. It does not to me by any means clearly appear that the estate, as regards boundaries, is not one and the same; in fact, I am satisfied that it is, and that the Plaintiff meant to describe the same estate which the Defendant meant to describe. Of course, if that is so, the question of boundaries is a mere question of parcels, which could be ascertained irrespective of the terms of the letter, the estate being sufficiently named.

The other point is a very peculiar one, and is more open to argument and discussion. The letter of the 4th of October being a lady's letter she added a postscript. The postscript is this: "I

shall withhold the right of removing the new materials used in rebuilding *Mornington House*, and all fixtures," &c., &c. Now, the Plaintiff is a builder, and he was to take that land as building land, and I presume that she meant this—"You will not want the house, you must pull it down, and therefore as there are new materials which were used in rebuilding it, and which will be useful to the vendor, the vendor may take them away." In answering that letter the Plaintiff begins by saying, "I beg to acknowledge the receipt of your letter of the 4th instant." Then he states the substance of the letter, there being an alternative offer to take the estate without the house and an acre and a half of land. He states the alternative of taking the whole estate without saying anything about the postscript, and then he says, "I hereby, on behalf of Mr. *Thomas Hussey*, of 96, *Kensington High Street*, accept your terms as above." Now, what does "as above" mean? I think it means the whole terms. "As above" refers to the letter as much as it refers to the portions stated of it, and I am of opinion that the Plaintiff intended to accept the offer as it stood, and he has sufficiently expressed that intention. I think that but for the one term, of which I have already spoken, there would have been a contract.

The next point taken was that the contract was abandoned. Now I think it very probable that if this case had ever come on for trial it would have resulted in shewing that (apart from the point as to the solicitor approving the title) there never had been a contract at all, and that what passed was only a negotiation from beginning to end. We are, however, on demurrer, and Defendants who choose to demur must take the statements in the statement of claim as they find them, and in this case it does not appear to my mind to be so clear on the statement of claim that that was the true state of the case as to make this objection sustainable. That being so, it seems to me, according to the usual rule of the Court of Appeal, that the demurrer should now be allowed with costs, and that there should be no costs of the appeal.

COTTON, L.J. :—

I agree that the demurrer ought to be allowed, but I do so upon a ground which admittedly was not argued before the Vice-Chan-

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cellor, that upon the construction of the letters of the 4th and 6th of October there was no concluded contract between the parties. To make a contract by letters, or by offer and acceptance, what you must find is this, an offer and a simple unconditional acceptance, that is to say, an acceptance not introducing any new term. If a new term is introduced, it becomes no longer an acceptance but a new offer, which must be accepted before there is any contract.

Now, is there not a new term introduced by the last words of the letter of the 6th of October, "subject to the title being approved by our solicitors"? The argument on behalf of the Respondent is this, that these words are merely surplusage, and express nothing but what the law would itself have implied. In support of that view Mr. *Pope* relied upon observations made by Mr. Justice *Fry*, that the objection taken by a solicitor to a title under a term of this sort, if it is agreed to by both parties, must be a reasonable objection, but that by no means shews that it is not a new term. Putting this term in the way in which Mr. *Pope* suggested it ought to be read, "subject to the solicitors, provided they act reasonably, being the judges whether there is a good title or not," it is something entirely different from the rule of law, which is, that the Judge, subject to the ordinary right of appeal, is the person to decide whether or no a good title can be made. That is what the law provides independently of stipulation, but this stipulation would make the solicitor, provided he acted reasonably and *bonâ fide*, the sole and absolute judge as to whether there was or was not a good title. If he acted reasonably and *bonâ fide* the Court (assuming that the term had been assented to and made part of the contract) would not inquire whether his objections were well founded in law. That being so, these words introduce a new term, and the letter is not an acceptance pure and simple of the offer contained in the previous letter.

On the other point which has been dealt with by the Master of the Rolls, as regards the matters arising upon the letter, I need not add anything to what he has said.

As regards the question of abandonment, that is a point which we could not possibly decide upon demurrer. It was quite right of the Defendant to ask the judgment of the Court upon de-



murrer as to whether there was a contract that could be enforced, but the point upon which we decide the demurrer was not taken in the Court below, and we are not in a position to say that our judgment would be in favour of the Defendant on the question of abandonment. As our decision in favour of the Defendant turns upon a point not raised by him in the Court below, I agree with what the Master of the Rolls has said as to the costs.

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JESSEL, M.R. :—

Lord Justice *Thesiger* has been compelled by public duties to leave the Court, and he desires me to say that he entirely concurred with the other members of the Court.

Solicitors for Plaintiffs: *Kynaston & Gasquet*.

Solicitors for Defendants: *Crowdy & Son*.

# *In re* EUROPEAN SOCIETY ARBITRATION ACTS.

## *Ex parte* LIQUIDATORS OF THE BRITISH NATION LIFE ASSURANCE ASSOCIATION.

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Feb. 1, 4, 26.

*Ultra Vires*—Purchase of Business by Company—Transfer to purchasing Company of Shares of selling Company.

The *B. N. Company* was an insurance company established with £10 shares, under a deed of settlement which provided that every instrument whereby the company became liable to pay money should contain a clause limiting the liability of shareholders to the amount payable on their shares. The deed contained a power to the company, with the sanction of an extraordinary general meeting, to purchase the business of any other company of a similar nature, upon such terms as the meeting should think fit. The company resolved to purchase the business of the *B. C. Company*, an insurance company whose capital was divided into £50 shares, on each of which £5 had been paid, and whose deed of settlement contained no power to sell the business. The transaction was completed by purchasing the shares of the *B. C. Company*, which were transferred to various officers of the *B. N. Company*. Subsequently a deed was executed by which these transferees transferred their shares to the *B. N. Company*, and thereupon that company was entered on the register of shareholders of the *B. C. Company*, and remained so registered for some years. This deed was never sanctioned by a general meeting of the *B. N.* shareholders. An order having been made for winding up the *B. C. Company* :—

*Held*, that the transfer of the shares to the *B. N. Company* was *ultra*

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*vires* and invalid, and that the *B. N. Company* could not be placed on the list of contributories of the *B. C. Company*.

By the *European Arbitration Act*, 1875, it was enacted that as regards any determination or order given or made before the passing of the Act, no appeal should lie therefrom unless the arbitrator expressly certified in writing that by reason of differences between previous decisions on matters of principle it was desirable that an appeal should be brought:—

*Held*, that a formal certificate from the arbitrator, and not a mere expression of opinion, was necessary to give the Court of Appeal jurisdiction; and that differences between previous decisions referred to decisions before the passing of the Act.

THIS was an appeal by the liquidators of the *British Nation Life Assurance Association* (hereinafter called the *British Nation*) against the decision of Mr. *F. S. Reilly*, the arbitrator appointed under the *European Assurance Society Arbitration Acts*, 1872, 1873, and 1875, to the effect that the *British Nation* should be put on the list of contributories of the *British Commercial Insurance Company*, and should be ordered to pay such call as might be necessary to discharge the *British Commercial* liabilities and the costs of the *British Commercial* liquidation; and that the liability of the *British Nation* in respect of such a call was unlimited, except so far as it was limited by the terms of the *British Commercial* policies and other contracts.

The *British Commercial* was established by a deed of settlement dated the 1st of May, 1821, with a nominal capital of £1,000,000, divided into 200,000 shares of £50 each. 12,000 of those shares were subscribed for, and calls to the amount of £5 a share were made thereon. It was an unregistered company within Part VIII. of the *Companies Act*, 1862. The deed of settlement contained the common clause providing for the insertion in its policies and other contracts of a provision that the contracting party should only look to the funds and uncalled capital of the company. And it did not contain any power enabling the company to transfer its business to another company.

The *British Nation* was established by a deed of settlement dated the 28th of February, 1855, with a nominal capital of £300,000, in shares of £1 each, subsequently altered to shares of £10 each. Its objects included all the usual business of a fire and life insurance company. It was completely registered under 7 & 8 Vict. c. 110, and on the 3rd of November, 1862, was regis-

tered under the *Companies Act*, 1862. The provisions to which notice was called during the argument were the following:—

“44. That two extraordinary general meetings shall have full power to extend the objects of the association to the making or effecting insurances on ships or vessels and their cargoes against loss or damage by fire, and against capture and other sea risks, and to the undertaking of any other such business as is usually undertaken by underwriters, and to make new laws, regulations, and provisions for the association, or to amend, alter, or repeal, either wholly or in part, all or any of the existing laws, regulations, and provisions of the association, provided that such extensions of the objects of the association, and such new, amended, or altered laws and provisions shall have been previously recommended by the board, and do not extend to, amend, alter, or repeal any provisions hereby expressly declared to be unalterable, or any of the laws, regulations, or provisions hereby established for limiting the individual responsibility of shareholders, and subject in all cases to the provisions and regulations of 7 & 8 Vict. c. 110, and these presents.

“45. That an extraordinary general meeting may accept or take a transfer of or purchase or acquire the business of any other associations, companies, or societies of a similar nature (wholly or in part) with the association hereby established, upon and under such terms, conditions, stipulations, and agreements as such meeting shall think fit.”

“91. That the board shall, as respects every life policy and other policy issued by the association, and every grant of annuity by the association, and every other instrument whereby a liability to pay any sum or sums exceeding in the whole the sum of £5 shall be incurred by the association (except in the cases specially provided for in clause 187, and except in the case of the lease of any house or offices rented by the association), cause to be inserted therein, either in express words or by reference to this present clause, a declaration that the capital, stock, and funds of the association shall alone be liable to answer and make good all claims under such policy, grant of annuity, or other instrument (as the case may be), and all other claims whatsoever against the said association, and that no director, proprietor, or member of

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the association shall in any manner be personally liable or subject to any such claims, or be bound by reason thereof to do anything more than (as respects a proprietor) to pay to the proper officers of the association the amount (if any) due from him to the association in respect of instalments upon his share or shares in the capital of the association."

Clause 187 prohibited making or issuing promissory notes or bills of exchange in the name or on the behalf of the association, and it also forbade the acceptance of bills by the association, except bills drawn by persons abroad for moneys payable in respect of claims under policies. Such last mentioned bills were not to be subject to clause 91.

Clause 119 gave extensive powers of investing the moneys in hand which were not required to satisfy immediate claims, and, *inter alia*, it was provided that the board, with the consent of not less than three directors present, might invest "in the purchase of shares in any docks, canals, rivers, navigations, waterworks, bridges, piers, railways, or turnpike roads established by Act of Parliament or in the purchase of any personal property of any nature or kind whatsoever, or of any debts, claims, and demands, or interests whatsoever, and of what nature or kind soever."

On the 17th of November, 1859, *Henry Lake*, the manager and secretary of the *British Nation*, in accordance with a resolution of the *British Nation* board of directors, passed on the same day, addressed the following letter to the directors of the *British Commercial* :—

"Gentlemen,—It has been suggested to the directors of this association and to myself that a union of the business of the *British Commercial Insurance Company* with this association would be advantageous to both institutions, and for the following reasons :

"First. The proprietary of the *British Commercial* might, if they so desired, be paid off at a price to be agreed upon—say 25s. per share, and transfer of such shares be taken by trustees to be appointed by this association.

"Second. This association having a business of nearly £30,000

a year at present arising from policies of an average of under three years would supply the older policies of the *British Commercial*, the element which alone is necessary to give force and value to its business. For the increased amount of the annual premium income would be better enabled to bear the certain claims which must arise from the older business of the *British Commercial* without, for many years to come, entrenching upon the assets reserved, thus protecting the company from the disastrous effects of a disturbed rate of mortality. A further negotiation for young life business, which, as your directors may be aware, carries with it invariably a large amount of future profit combined with greatly increased security, is pending, and on the very eve of completion, by which an addition of £20,000 a year will be made to the income of this association, forming a gross income of £50,000 per annum.

“Third. This association possesses a staff of nearly 1000 agents, now producing a large amount of new business, which is rapidly increasing, and all anxious to co-operate with the directors of this association in the effort to obtain an increased connection, and it may be fairly urged that with the business of the *British Commercial* in union with this association the agents of that company will be more likely to work with vigour for the combined institutions and to obtain more business in consequence than could be expected under existing circumstances from the agents of the *British Commercial* alone.

“Fourthly. The shareholders in this association are upwards of 300 in number, and they are prepared in every possible way to co-operate in the endeavour to increase the business of the institution, and from this circumstance also the *British Commercial* connection will derive an increased advantage, there being a reserve of actually subscribed capital amounting to £92,500.

“Under these circumstances the directors of this association would be glad if the directors of the *British Commercial* would consider this letter as a basis of a proposition for a union of the business of the *British Commercial* and *British Nation Companies* upon the following understanding :—

“The shareholders of the *British Commercial* should be paid off at the rate of 25s. per share, and their shares transferred.

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* “That the directors of the *British Commercial*, with the consent of the shareholders, be paid a compensation of £1000 by this association.

“That the staff of the *British Commercial* be retained by the *British Nation*, and that the directors of the *British Nation* be at liberty to apply to any director or officer of the *British Commercial* to assist this association in the completion of such proposed arrangement after the shareholders have decided upon its adoption.

“That the trustees should be appointed to hold the assets of the *British Commercial* pending the completion of the proposed arrangement.

“That an Act of Parliament should be forthwith applied for if agreed to be necessary to consolidate the proposed union.

“Thus a strong company may be formed, to the permanent benefit of all interested.”

By a resolution passed on the 2nd of January, 1860, the directors of the *British Commercial* resolved that the directors of the *British Nation* should be informed that the board accepted the offer contained in the foregoing letter, subject to the approval of their shareholders, and also resolved that a special extraordinary meeting of the shareholders should be called on the 21st instant, to consider the offer of the *British Nation*, for its adoption or otherwise, and that the meeting should be advertised as therein mentioned. The meeting was advertised accordingly, and on the 6th of January, 1860, a circular was issued to the shareholders of the *British Commercial* as follows:—

“Sir,—Herewith you will receive a formal notice convening an extraordinary or special meeting of the proprietary for the 21st inst. The object of the meeting is to consider a proposal for the union with or transfer of the business liabilities and assets of this company to another company.

“I am instructed to inform you that the proposition above referred to has been under the consideration of the directors of this company for some time past, and after careful investigation they have arrived at the unanimous resolution to adopt and accept the same, subject to the approval and confirmation of the

shareholders. I may add that the proposition contains an offer of 25s. per share to the shareholders of the *British Commercial*, who will also be relieved of their liabilities in respect of such shares."

The notice referred to in this circular was for an extraordinary meeting on the 21st, for the following purposes, viz. :—

"1st. For the purpose of considering a proposal for the union or 're-assurance' with or transfer of the business liabilities and assets of this company to another company.

"2nd. For the purpose of adopting and accepting or otherwise the offer contained in the proposal for union or transfer above referred to.

"3rd. For the purposes of investing the directors with necessary powers to enable them to complete and forthwith to carry out such union or transfer, and for the purpose of dissolving the said *British Commercial Life Insurance Company*, should that course be deemed expedient."

At the meeting of the *British Commercial*, held accordingly on the 21st of January, 1860, it was (amongst other things) resolved :—

"1st. That the proposal of the *British Nation Life Assurance Association* as contained in their letter of the 17th of November last, now read, be and is hereby adopted and accepted.

"2nd. That with a view of carrying out the last resolution for the union of the two companies, the shareholders of this company present at this meeting do approve of and accept the proposal made on behalf of certain members of the *British Nation Life Assurance Association* for the purchase of shares in this company at the price of 25s. per share.

"3rd. That the directors be and are hereby authorized and empowered to take such steps in accordance with the provisions of the deed of settlement of this company as may be necessary to carry such proposal into effect on behalf of the shareholders."

An extraordinary general meeting of the *British Nation* shareholders was convened for the 20th of January, 1860, by a notice stating that the meeting was to be held for the purpose of invest-

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ing the directors under the 45th clause of the deed of settlement with the necessary powers for taking to the business of another life assurance company, and for the purpose of making certain alterations in the deed of settlement, namely, as to the time of holding ordinary general meetings; as to voting by ballot; as to remuneration of auditors; as to the calling of general meetings; &c. The meeting was accordingly held on the 20th of January, and the notice convening it, and the *British Nation* manager's letter of the 17th of November, 1859, and the *British Commercial* directors' resolution of the 2nd of January, 1860, were read, and it was resolved:—

“[I.] That this meeting having heard the terms of the proposed arrangement with the *British Commercial Company* approves of the same, and hereby authorizes and empowers the directors of this company to take such steps as they may consider necessary for carrying the same into effect, and to issue in lieu of the payment of 25s. per share to such proprietors of the *British Commercial Insurance Company* as may elect to receive the same shares in this association either wholly or in part paid up to the extent of 30s. for each *British Commercial Insurance Company's* share so held by such proprietors as aforesaid.

“[II.] That *George Bermingham*, the chairman of this association, and the manager, *Henry Lake*, be and they are hereby appointed trustees of this association, with such trustee as may be named on the part of the *British Commercial Insurance Company*, for the purpose of holding the assets, &c., in trust of the *British Commercial Insurance Company*, and for other arrangements pending the complete transfer of that company to this association.

“[III.] That pending the completion of the arrangements with the *British Commercial Insurance Company* with this association the manager and secretary, *Mr. Lake*, be and he is hereby permitted and allowed to accept the appointment of manager to the *British Commercial Insurance Company*.

“[IV.] That the directors of this association be and they are hereby empowered to appoint from time to time such trustees, whether shareholders or others, as may in their discretion be necessary for holding such shares of the *British Commercial Insurance Company* as in the arrangements contemplated may be

required to be transferred, and that such trustees be and they are hereby indemnified from any liability in respect of the *British Commercial* shares so transferred save in their capacity of shareholders in this association."

These resolutions were confirmed at a second meeting on the 4th of February, 1860.

Two deeds, dated respectively the 8th of February and the 7th of June, 1860, were executed for carrying into effect the arrangement authorized by the foregoing resolutions.

The deed of the 8th of February, 1860, was an indenture expressed to be made between *Bermingham* and *Lake* of the first part, the persons named in the first part of the schedule thereto (being individual shareholders in the *British Commercial*) of the second part, and the persons named in the second part of the schedule being joint owners of shares in the *British Commercial* of the third part. It recited that *Bermingham* and *Lake* had agreed to purchase from the parties of the second and third parts their respective shares at 25s. per share; and by the witnessing part the parties of the second and third parts covenanted, on payment of that price for their respective shares, to transfer them to *Bermingham* and *Lake*, or their nominees; and *Bermingham* and *Lake* covenanted that they would, by themselves or their nominees, accept transfer of the shares, and would before the 1st of July, 1860, concur in all acts requisite to cause the shares purchased to be transferred out of the names of the persons in whose names they were standing into the names of some other persons, and would pay the purchase-money in manner therein mentioned. The deed contained a proviso for avoiding it if the holders of five-sixths of the shares in the *British Commercial* did not enter into it before the 25th of March then next.

The deed of the 8th of February, 1860, was executed, between the 10th of February and the 23rd of June, 1860, by 174 shareholders of the *British Commercial*, holding in the aggregate 11,014 shares. Of these 174 shareholders, seven, who held in all seventy-nine shares, did not at any time execute any transfer of any of their shares in pursuance of that deed or of the amalgamation arrangement, but 167, holding in all 10,135 shares, executed between the 17th of December, 1859, and the 23rd of February,

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1865, under the amalgamation arrangement, transfers of their shares in the *British Commercial*, either to *Birmingham* and *Lake*, or one of them, or to persons nominated for that purpose by *Birmingham* and *Lake*.

After the execution of the deed of the 8th of February, 1860, but before the 21st of April, 1865, seventeen shareholders of the *British Commercial* who did not execute the deed of the 8th of February, 1860, holding in the aggregate 776 shares, executed, under the amalgamation arrangement, transfers of those shares to *Birmingham* and *Lake*, or one of them, or to other persons nominated for that purpose by the *British Nation*.

All the transfers mentioned above were in the common form, and nearly all the transferees were officers or servants of the *British Nation*, and executed the deed of the 7th of June, 1860. This latter deed was an indenture expressed to be made between the parties executing in the schedule, including *Birmingham* and *Lake* of the first part, *Birmingham* and *Lake* of the second part, and the *British Nation* of the third part. This deed recited the deed of the 8th of February, 1860, and that in further pursuance of the above arrangements the persons named in the first column of the schedule had transferred their shares in the *British Commercial* to *Birmingham* and *Lake*, or to the other parties thereto of the first part as their nominees. The parties of the first part then declared that they would stand possessed of the shares so transferred to them in trust for the *British Nation*. And by the same indenture the *British Nation* covenanted with each of the parties of the first part that the *British Nation* would indemnify them, their heirs, executors, and administrators, from all liability in respect of the shares so transferred to them. This deed was not submitted to or approved by the *British Nation* shareholders in general meeting. None of the *British Commercial* shareholders who executed, under the amalgamation arrangement, transfers of their shares gave the directors any such notice of transfer as was required by the *British Commercial* deed of settlement, nor did any of their transferees execute such deeds of covenant as were required to be executed by purchasers of shares binding them to observe the stipulations of the deed of settlement.

Twenty-three shareholders of the *British Commercial*, holding

in the aggregate 210 shares, executed neither the deed of the 8th of February, 1860, nor any transfer of their shares.

On the 30th of January, 1860, the secretary of the *British Commercial* issued a circular to the shareholders therein, informing them of the result of the meeting of the 21st of January, 1860, and inclosing a copy of the resolutions passed at it.

On the 23rd of March, 1860, the *British Nation* manager issued a circular to the *British Commercial* shareholders in which he appointed a day for the payment of the first two-fifths of the price of the *British Commercial* shares, and inclosed two alternative forms for signature, by one of which the shareholder signing would agree to take the price of his shares in cash, and by the other of which the shareholder signing would agree to take the price of his shares in shares of the *British Nation*. Fourteen *British Commercial* shareholders holding 1020 shares took *British Nation* shares under the amalgamation arrangement. All the *British Commercial* shareholders who executed, under the amalgamation arrangement, transfers of their shares, received the consideration for them according to that arrangement.

After the deed of the 8th of February, 1860, the business of the *British Commercial* continued for some time to be carried on as a separate business, and that company issued new policies down to the 29th of May, 1862, after which day no contract was made or fresh liability incurred by it. It paid claims down to the 19th of March, 1863. After April, 1863, it had no office separate from the office of the *British Nation*. On the amalgamation arrangement, Lake, the manager and secretary of the *British Nation*, became also the manager of the *British Commercial*, and the secretary of the *British Commercial* was employed in the office of the *British Nation*, and attended to any matters connected with the *British Commercial*.

After the 1st of January, 1860, only two general meetings of the *British Commercial* shareholders were held, namely, on the 12th of March and the 22nd of May, 1861, at the former of which new directors were appointed. The last memorial of the names of *British Commercial* directors inrolled under the *British Commercial* Act of Parliament was inrolled on the 13th of February, 1865. The company, however, was never dissolved.

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On the 22nd of December, 1864, an extraordinary court of directors of the *British Commercial* was held, when it was resolved :

“That the existing amalgamation of the business of this company with the business of the *British Nation Life Assurance Association* be adopted and confirmed, and that the trustees of this company be directed to take such steps and do such acts and execute such instruments as might be considered necessary with a view to perfecting such amalgamation and legally vesting the assets of this company in the said association.”

On the 29th of December, 1864, the *British Nation* board of directors resolved : “That the existing amalgamation of the business of the *British Commercial Insurance Company* with the business of this association be adopted and confirmed, and that the deed, a copy of which has been submitted to and approved of by this board, is a proper deed for carrying the said amalgamation into effect, and that the seal of this association be accordingly affixed thereto.”

These resolutions were carried into effect by a deed of the 31st of December, 1864, indorsed—Deed of Amalgamation. By this deed the holders of 9892 shares, which had been transferred to them as trustees for the *British Nation*, purported to transfer them to the *British Nation*, and the *British Nation* covenanted to indemnify the transferors from all debts in respect of the engagements of the *British Commercial*, subject to a proviso that only the subscribed capital of the *British Nation* should be liable under the covenant. This deed of amalgamation was not submitted to or approved by the *British Nation* shareholders in general meeting.

The transfers of *British Commercial* shares made under the amalgamation arrangement, and the general assignment of *British Commercial* shares made by the deed of the 31st of December, 1864, were from time to time entered in the share ledger of the *British Commercial*. The form of entry as to shares assigned by the latter deed was, “By deed dated the 31st of December, 1864, the above shares were assigned by the above-named to the *British Nation Life Assurance Association*, their successors and assigns.”

Memorials of the names of the assignees under the last-mentioned transfers and assignment were from time to time inrolled

in the Court of Chancery, the inrolments being expressed to be made pursuant to the *British Commercial* Act of Parliament. The last of those memorials was inrolled on the 1st of September, 1865, and gave the *British Nation* as the assignee of the bulk of the shares.

The *British Nation* went into voluntary liquidation under a resolution passed on the 18th of January, 1872; and that liquidation was by order dated the 29th of January, 1872, continued under the supervision of the Court under the provisions of the Companies Acts. On the 19th of July, 1872, the *British Commercial* was, on the petition of a creditor, ordered to be wound up under the Companies Acts. These liquidations went on under the *European Society's* Arbitration Acts. The whole of the subscribed share capital of the *British Nation* was called up, and a further call of £4 a share was made for costs and expenses of the liquidation of that company.

In *Rivington's Case* it was decided that *William Rivington*, who was a holder at the date of the amalgamation of 200 shares in the *British Commercial*, and who executed the deed of the 8th of February, 1860, and a transfer of his shares thereunder to *Birmingham*, was not to be settled on the list of contributories of the *British Commercial* in respect of those 200 shares, for any purpose whatever, even as regarded liabilities of the *British Commercial* incurred before he executed the transfer, or as regarded the costs of winding up that company.

In *Lawson's Case*, Lord Romilly decided that *Lawson*, to whom, as one of the nominees of the *British Nation*, shares in the *British Commercial* had been transferred as part of the amalgamation arrangement, and who had executed a declaration of trust of those shares for the *British Nation*, was not a contributory of the *British Commercial* in respect of those shares.

In *Chatteris's Case*, Lord Romilly decided that *Chatteris*, one of the seven shareholders of the *British Commercial*, who executed the deed of the 8th of February, 1860, but did not execute transfers of their *British Commercial* shares under the amalgamation arrangement, was not a contributory of the *British Commercial*.

In *Edwards's Case*, Lord Romilly decided that *Edwards*, one of the twenty-three shareholders of the *British Commercial*, who did

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not execute the deed of the 8th of February, 1860, or any transfer of their shares under the amalgamation arrangement, was not a contributory of the *British Commercial*.

The result of the above decisions was that none of the shareholders of the *British Commercial* were liable to be put on the list of contributories of that company, and that persons to whom shares had been transferred in trust for the *British Nation* were not contributories. Unless, therefore, the *British Nation* could be put on the list of contributories there was no contributory at all.

The case before the arbitrator sought to make the *British Nation*, and also *Lawson*, *Chatteris*, and *Edwards*, liable as contributories of the *British Commercial*, and the case as against these three persons was reheard, notwithstanding Lord *Romilly's* previous decisions in their favour. The arbitrator held the *British Nation* liable and the other Respondents not liable.

The arbitrator certified for an appeal, but did not give the special certificate applicable to the case of previous conflicting decisions.

An appeal was at the same time brought from the decisions in the cases of *Chatteris*, *Lawson*, and *Edwards*, although the arbitrator had not given a written certificate as required by the *Arbitration Act*, 1875. The appeal was heard on the 28th and 29th of January, and the 1st and 4th of February, 1878.

Argument.

Bagshawe, Q.C., *Cookson*, Q.C., and *Lemon*, for the *British Nation*, in support of this appeal:—

It is made a fundamental principle of the constitution of the *British Nation* by sect. 91 that no contracts shall be entered into on behalf of the company which impose on the shareholders unlimited liability. It is quite against this that the company should become a shareholder in another company, and indeed it is quite beyond the scope of a joint stock company to become a shareholder in another company unless authority is expressly given for that purpose. We say, then, that the deed of the 31st of December, 1864, by which it is alleged that the *British Nation* became legal holders of shares, is *ultrà vires* and invalid, and that the *British Nation* never became a shareholder. The shares no doubt were held by trustees for the *British Nation*, but that does not make

the *British Nation* a contributory, and it cannot be held such. In *Peek's Case* (1) there was a complete contract to take shares, and this is necessary: *King's Case* (2). The trustee, not the *cestui que trust*, must be on the list: *Williams' Case* (3). If a man is not liable to creditors he cannot be a contributory: *Bright v. Hutton* (4). The arbitrator thought that sect. 200 of the *Companies Act*, 1862, made a person liable to be put on the list of contributories through having agreed to take shares without putting forward his own name, and no doubt in many cases this is so; but if shares are duly vested in a trustee for *A. B.*, that does not make *A. B.* a contributory. He is liable to indemnify his trustee, but that does not enable you to take the short cut of making him a contributory. None of the *British Commercial* shareholders can complain on the ground of the *British Nation* not being put on the list. They are of three classes: first, those who under the arrangement covenanted to transfer, and did transfer, to trustees for the *British Nation*. They are released from liability. *Rivington* is a type of that class. Then there are those who did not covenant, but did transfer; they are free from all liability. Then there are those who neither covenanted to transfer nor transferred; they were strangers to the transaction, and cannot have any complaint to make. In order to make out the *British Nation* to be a contributory, it must be shewn, 1, that it became a shareholder at law; or, 2, that it contracted to become such so as to be a shareholder in equity; or, 3, that, under the *Companies Act*, 1862, s. 200, it is liable to be settled as a contributory by reason of being liable at law or in equity to contribute to pay off the debts of the *British Commercial*. Now, did the *British Nation* contract to become a shareholder? One company registered under the Act of 1862 can take shares in another: *In re Barnard's Banking Company* (5), but only if authorized by its articles to do so; and here the *British Nation* had no such power. Its deed being completely registered, was notice to all the world. Now, clause 119, which is the only clause authorizing the taking shares of any kind, does not authorize the taking shares in a limited company. Clause 45

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(1) Law Rep. 4 Ch. 532.

(3) 1 Ch. D. 576.

(2) Ibid. 6 Ch. 196.

(4) 3 H. L. C. 341.

(5) Law Rep. 3 Ch. 105.

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does not authorize it, for taking shares is quite different from taking to a business. The deed of the 8th of February, 1860, is a deed to which the *British Nation* was not a party; it could not be bound by that to become a shareholder. The deed of the 7th of June, 1860, was never approved by the company in general meeting, nor does it follow from any resolution of a general meeting, it therefore cannot bind the company. The transfer was made when the *Commercial* company was virtually dissolved, and is therefore void: *Chappell's Case* (1); *Lankester's Case* (2); *Allin's Case* (3). The arbitrator seems to have been influenced by the view that a *cestui que trust* can be put on the list in place of the trustee by reason of his obligation to indemnify him; and *Hemming v. Maddick* (4) was referred to as establishing this, but rightly understood the case goes quite the other way. The authorities are clear that the trustee must be on the list, not the *cestui que trust*: *Chapman and Barker's Case* (5); *Ex parte Challis* (6).

Sir H. Jackson, Q.C., and Whitehorne, for the *European Society*, took no part in the argument.

Higgins, Q.C., and *Romer*, for the liquidators of the *British Commercial*:—

The claims established against the *British Commercial* amount to about £180,000, and if this appeal be simply allowed they will be worthless. There must be a liability to contribute somewhere. It has been decided that the transferors of the *Commercial* shares are not liable, nor the transferees who transferred to the *British Nation*, and it necessarily follows that the *British Nation* must be. Now, as to the objection that any contract imposing an unlimited liability on the shareholders was *ultra vires*, we contend that it was perfectly competent to the shareholders by mutual consent to annul the clause imposing this restriction on contracts, and that the shareholders did so. At the commencement of the winding-up of the *Commercial* the *British Nation* was on the publicly inrolled list of members, and had been there for years.

(1) Law Rep. 6 Ch. 902.

(2) Ibid. 905, n.

(3) Law Rep. 16 Eq. 449.

(4) Law Rep. 9 Eq. 175; Ibid. 7 Ch. 395.

(5) Law Rep. 3 Eq. 361.

(6) 16 W. R. 451.

The process of this amalgamation was unique. No attempt was made to produce a novation. The policy-holders were not consulted. The *Commercial Company* was kept alive. The *Bank of London Case* (1) has no application. The amalgamation in our case, as it was effected, was quite *intrà vires*. In the *Albert Case* the clause limiting the powers of the company to alter the rules was stronger than in our case. There was no power to amalgamate at all: the *British Nation* deed gives power to amalgamate. But in truth no power is necessary. There is nothing that a general meeting cannot alter if all the shareholders consent. Even if limited liability be a fundamental principle of the company, the shareholders may consent to alter it. If all the shareholders can alter the laws as they please, a majority may do so, if the minority acquiesce. If the minority protest, it may be different; but if they acquiesce, they must be taken as consenting. Our positions are—1. At the commencement of the winding-up of the *Commercial* in 1872, the *Nation* was on the list of shareholders, and had been there for seven or eight years, and their name was put on by their own consent, without any intervention of the *Commercial*, by which the creditors of the *Commercial* cannot be prejudiced. 2. The onus is on the *British Nation* to have its name removed from the list of members, and it cannot now get the register rectified. Even if there were no formal difficulty, it has no equity to do so. The Appellants say, first, that the *British Nation* had no power to take shares, and, secondly, that it did not take any. We say that it had power to take, and did take, shares. 3. We rely on the effect of the 200th section. There was a contract to take shares, and the company became equitable shareholders. 4. We rely on the authorities as to the effect of acquiescence. Assuming that there was an informality, the acts of the *British Nation* render it impossible for them to take advantage of it. As to the first and second propositions, *Oakes v. Turquand* (2) shews that there are many cases where persons who are on the register at the time of the winding-up cannot get their names taken off, although they might have done so before the winding-up. There is nothing in the nature of a company which in itself prevents it from holding shares in another company. The Act of 1862

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(1) *Albert Arb.* Part I. App. B.(2) *Law Rep.* 2 H. L. 325.

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assumes that it may be done: *In re Barned's Banking Company* (1); *Royal Bank of India's Case* (2). It is not for us to shew a special power in the articles of the *British Nation* to take shares, provided it is in accordance with the general objects of the company; and even if there was anything against it in the articles of the company, a general meeting had power to alter it, and did alter it. Power is given by clauses 44 and 45. Clause 91, which says that the liability is to be limited in all contracts, only applies to acts done by the directors, and the reservation in clause 44 means that no alteration may be made which shall give power to the directors to pledge the unlimited liability of the shareholders, but a general meeting had power to do what has been done: *Greenwood's Case* (3); *Agar v. Athenæum Assurance Society* (4); *Prince of Wales Assurance Society v. Athenæum Assurance Society* (5); *Ernest v. Nicholls* (6). This was an unregistered company, and therefore the constitution could be altered with the consent of all the shareholders, express or implied: *Lindley on Partnership* (7); *Webb v. Herne Bay Commssioners* (8); *Lane's Case* (9).

3. As to the effect of sect. 200 of the *Companies Act*, 1862, there was a bargain between the two companies that the *Commercial* shares should be bought up on behalf of the *Nation*; that the *Nation* should be liable for the debts of the *Commercial*, and that the *Nation* should take the shares and should indemnify the trustees. The *Nation Company* was therefore the real owner of the shares, and a contributory of the *Commercial Company* under sect. 200: *Williams' Case* (10).

4. As to the acquiescence of the shareholders of the *British Nation*, we say that the shareholders confirmed the transaction, even if it was *ultrà vires*: *Re Era Company* (11); *Evans v. Smallcombe* (12); *Phosphate of Lime Company v. Green* (13). The Court will not interfere to stop acts which are *ultrà vires*, if there has been acquiescence on the part of the body of the shareholders,

(1) Law Rep. 3 Ch. 105.

(2) Ibid. 4 Ch. 252.

(3) 3 D. M. & G. 459.

(4) 3 C. B. (N.S.) 725.

(5) Ibid. 756, n.

(6) 6 H. L. C. 401.

(7) Vol. i. p. 263.

(8) Law Rep. 5 Q. B. 642.

(9) 1 D. J. & S. 504.

(10) Law Rep. 9 Eq. 225, n.

(11) 1 H. & M. 672.

(12) Law Rep. 3 H. L. 249.

(13) Law Rep. 7 C. P. 43.

unless they are contrary to the fundamental purposes of the company: *Anglo-Australian Assurance Company v. British Provident Life Assurance Society* (1). In this case the *British Nation Company* has enjoyed the benefit of the agreement. They have taken all the premiums since 1860: *Re Phoenix Life Assurance Company* (2); *Re Sea, Fire, and Life Assurance Company* (3). A third party is not bound to examine into the question whether a company has observed all the conditions imposed by its articles: *Royal British Bank v. Turquand* (4). Sect. 47 gives power to purchase on such terms as the directors think fit.

[JAMES, L.J.:—That would not authorize anything which in substance altered the constitution of the company.]

Taking shares must have been contemplated, for in no other way could the business be acquired.

[JAMES, L.J.:—Buying shares is quite a different thing from buying a business. The shares are not the property of the selling company.]

The power was created before the Companies Acts, and must be taken to authorize the acquiring the business of a private partnership, which could only be acquired by transfer of the shares of the partners.

[JAMES, L.J.:—No. The partners together would convey the entire property.]

There is power to invest in the purchase of personal property.

[JAMES, L.J.:—How could such a power authorize becoming a partner in a business?]

The provision as to limited liability is merely a regulation for the shareholders *inter se*, and does not affect third parties: *Greenwood's Case* (5). Where there is a direct contract between the company whose shares are held and the beneficiary, the beneficiary is the person responsible: *Reaveley's Case* (6).

On the appeals in the cases of *Chatteris*, *Lawson*, and *Edwards*, being opened,

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(1) 3 Giff. 521; 4 D. F. & J. 341.

(2) 2 J. & H. 441.

(3) 5 D. M. & G. 465.

(4) 6 E. & B. 327.

(5) 3 D. M. & G. 459.

(6) 1 De G. & Sm. 550.

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*Hemming*, Q.C., and *Millar*, for *Chatteris*, took a preliminary objection:—

The decision in *Chatteris' Case* was made by Lord *Romilly* under the *European Arbitration Act* of 1872. By the 16th section of that Act, after directing how applications are to be made to the arbitrator, it was enacted "that the opinion or decision of the arbitrator on any such application, or with respect to the costs thereof, or on any matter or thing within his jurisdiction, shall not be subject to any review or appeal." Then the *European Arbitration Amendment Act*, 1875, sect. 3, provides that the Court of Appeal in Chancery shall have jurisdiction and power to entertain an appeal from any determination or order of the arbitrator given or made before or after the passing of this Act. And then it goes on to enact that, "An appeal shall lie from any determination or order of the arbitrator accordingly, subject to the foregoing provisions (among others):

"(1) As regards any determination or order given or made before the passing of this Act, an appeal shall not lie therefrom unless the arbitrator expressly certifies in writing that by reason of differences between previous decisions on matters of principle relating to cases of novation or of liability of contributories, it is desirable that an appeal be brought."

In the present case, Mr. *Reilly*, the present arbitrator, has not given any certificate that it is desirable that there should be an appeal. The Court, therefore, has no jurisdiction to hear the appeal. The fact that the arbitrator has made these persons Respondents to the special case is not sufficient without a formal certificate.

*Bevir*, Q.C., and *Bissell*, for *Lawson*, and *J. Pearson*, Q.C., and *Millar*, for *Edwards*, took similar objections.

*Higgins*, Q.C., and *Romer*, for the Appellants:—

These Respondents are not in the same position as if a final award had been made before the passing of the Act of 1875. Although Lord *Romilly* had given his decision upon their cases, it was open to him or his successor to reconsider those decisions at any time before the final award. That was the view that Lord



*Cairns* took in the *Albert Arbitration*. And Lord *Romilly*, in this arbitration, reheard a case which had been decided by Lord *Westbury*. The words "previous decisions" mean decisions before the appeal is brought, not necessarily before the passing of the Act of 1875. And there cannot be a doubt that, in the words of this Act, there have been "differences between previous decisions on matters of principle" relating to the questions now before the Court. If, therefore, the arbitrator has not given a certificate, it is only the omission of a form, which we could get rectified. But, in fact, the form of the special case to which these Respondents are made parties, and in which the judgment of the Court of Appeal is asked, "What other decision should be given either as between the Appellants and Respondents, or any of them, or as among the several Respondents," amounts in itself to a certificate that the appeal in the case of these Respondents is desirable.

Feb. 1. JAMES, L.J.:—

The absence of the certificate is to my mind conclusive. The arbitrator has not given the certificate required by the Act of Parliament. We have heard a very long argument to shew that if he had not given the certificate in words he had done so in effect, and that he meant to say there had been that difference of opinion. As at present advised, I see no ground for that contention. I think it right to say that the 16th section of the first Act of Parliament is one to which effect must be given according to its plain meaning. Nobody can doubt that that 16th section says that application shall be made to the arbitrator in such manner and form, and shall be heard and disposed of as the arbitrator shall direct, and every decision of the arbitrator upon any such application, shall not be subject to review or appeal. Then Messrs. *Chatteris*, *Lawson*, and *Edwards* say: "We have a decision by the arbitrator in our favour, and that decision was by the Act of Parliament made final." The further clause in the *Amendment Act*, which has been relied upon, must be construed very strictly in favour of the gentlemen who rely on the 16th section of the old Act. The Amendment Act, after a recital that, in some cases of great importance as affecting the liquidations of

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the companies subject to the arbitration, the second arbitrator had differed in opinion from and varied the determinations and orders of the first arbitrator, and difficulty had ensued therefrom in the conduct of the administrative business of the arbitration, contains a clause that, in certain cases, an appeal shall lie from any determination or order of the arbitrator, subject to the following provisions, the first being: "As regards any determination or order given or made before the passing of this Act an appeal shall not lie therefrom unless the arbitrator expressly certifies in writing that by reason of differences between previous decisions on matters of principle relating to cases of novation or of liability of contributories it is desirable that an appeal be brought." Now, the meaning of these words "between previous decisions" must be decisions previously acted upon. I think, therefore, that the arbitrator purposely abstained from giving a certificate.

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I am of the same opinion. We are bound to come to a decision on the objections raised on behalf of these gentlemen to the hearing of an application in the nature of an appeal against the former decisions in this case, and as far as they are concerned we are bound to deal with that objection irrespective of any inconveniences that may be occasioned to other parties by reason of the mode in which we deal with it. Each of these three gentlemen has had a determination in his favour by one of the previous arbitrators. At the time when those determinations were arrived at, an Act of Parliament was in force which declared that they should be final and conclusive, and not open to review or appeal, and before the Act of 1875 was passed, these gentlemen were entitled to rely upon these determinations as being final and conclusive. When the Act of 1875 was passed, it recited, as was the fact, that in the course of the liquidations of these companies by the two preceding arbitrators there had been differences of opinion on matters of principle, and it went on to recite, that, though there was an imperative provision in the former Act of Parliament that their decisions should be without appeal, it was proper that in certain cases there should be a power of appeal, but the enacting

part limits the right of appeal, as far as regards any determination or order given or made before the passing of the Act of 1875, to cases in which the arbitrator expressly certifies in writing that it is desirable that an appeal should be brought by reason of differences between the previous decisions. No language could be more clear, having regard to the previous recital, though I should have thought it sufficiently clear without it, to express that the conflict of principle must have been in connection with some determination or order arrived at before the Act of 1875 was passed. It would be convenient, no doubt—I do not mean to say that the arbitrator is bound to do so, but it would be convenient—if he did expressly certify, in each particular case, that by reason of such differences in principle an appeal should be brought, and that he should specify himself, on the certificate, what those differences in principle are on which he thinks it desirable that there should be an appeal. However, I say no more on that. With regard to its being desirable that such an appeal should be brought, I feel quite clear that we are bound to have, on his responsibility, a distinct statement in writing that he considers there is a proper case for appeal. We have here no such clear case and no such certificate. Now, it has been suggested that though the certificate does not exist, there may be the means and the opportunity of procuring it. I am far from saying that in no possible case would this Court give the opportunity for a certificate being obtained after the appeal was lodged, but it must certainly be an extreme case to justify it. At the present moment I see no reason for giving that leave, or allowing the matter to stand over in order that such certificate should be obtained. As far as I am able to trace the decisions arrived at by Lord *Westbury* in *Rivington's Case*, and Lord *Romilly* in the cases which are represented before us to-day, I can see no difference in matter of principle. It is possible, and it may be so urged, that a principle applied in an earlier case was applied also in a later to which it was not properly applicable, but that is not a difference in principle. It may be at the outside an error of judgment as regards the application of a recognised principle. I think, therefore, that the objections that are taken on behalf of Messrs. *Edwards*, *Chatteris*, and *Lawson*, are well founded.

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I am also of opinion that the preliminary objection that is taken is well founded. I ground my judgment on the absence of the certificate by the arbitrator. At the same time I may say that nothing which I have heard has satisfied me that there has been any difference of principle between the decisions of Lord *Romilly* and Lord *Westbury* on the point which we have to deal with. Also, I am not satisfied that there has been any difference between the decision of Mr. *Reilly*, in point of principle, and the previous decisions of Lord *Romilly* and Lord *Westbury*. And, although I was very much struck with the ingenuity of the argument of Mr. *Romer*, founded on the meaning of the words “between previous decisions,” I am not satisfied that, even if we were to give any decisions which were contrary to the previous decisions of Lord *Romilly* and Lord *Westbury*, that that would enable those decisions, given, as they were, before the passing of the Act, to be reviewed on appeal, even if a certificate were given.

On the appeal of the *British Nation* their Lordships reserved their judgment.

Judgment.

Feb. 26. JAMES, L.J., now delivered the judgment of the Court (*James, Baggallay, and Thesiger, L.JJ.*):—

The circumstances under which this appeal has been brought, and the facts on which it has to be decided, are sufficiently stated on the special case, settled by the arbitrator, and the appendix thereto.

In some respects, by reason of the decisions of former arbitrators, the question has assumed a very peculiar aspect. The question immediately before us is whether the *British Nation Association*, in its quasi corporate character, is or is not liable to be placed on the list of contributories of the *British Commercial Company*. That company, at the commencement of the transactions out of which this question has arisen, consisted of 174 shareholders, holding 11,014 shares, seventeen other shareholders holding 776 shares, and twenty-three other shareholders holding 210 shares. The differences in the position of these several classes of share-



holders appear in the special case. By decisions in the arbitration all these several persons were declared not to be liable as contributories.

In the course of the transactions 184 shareholders executed transfers of, in the aggregate, 11,711 shares to persons who were directors, officers, servants, or other nominees of the *British Nation* as its trustees, and by a deed, dated the 31st of December, 1864, shares, amounting in the aggregate to 9892, were expressed to be assigned to the *British Nation* itself by the persons to whom they had previously been transferred as such trustees.

In *Lawson's Case* it was decided by Lord Romilly, as arbitrator, that such last-mentioned persons were not liable to be put on the list of contributories. And it was contended before us that it followed logically from those decisions that the *British Nation* was, as the ultimate transferee, the shareholder in respect of those shares. The original shareholders were, it was said, exonerated by reason of their having got rid of their shares, and the intermediate transferees were in like manner exonerated by reason of their having transferred their shares to the *British Nation*. Either, therefore, it was urged, the previous decisions, or one of them, were or was wrong, or the *British Nation* must be liable as transferee. And in this view of the case the persons who had obtained the decisions in their favour were made respondents to this appeal with the view, if possible, of having the whole matter determined by this Court as to who ought to have been, and who ought to be, placed on the list of contributories. But it was contended by such respondents, and we decided, that under the Acts regulating the arbitration no such appeal was competent, and that the decision in their favour was absolute and final. And, on the other hand, it was contended by the shareholders of the *British Nation* that they were no parties to the previous decisions, that there was, so far as they were concerned, no *res judicata*, and that they were entitled to have their case decided wholly unprejudiced by the former decisions. This contention is, we think, not to be gainsayed. Their argument on the merits may be very shortly stated. The deed by which their officers and trustees affected to divest themselves of their shares, and to vest them in the association, is, they say, *ultrà vires* and void.

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The association was formed for the purposes mentioned in Article 3 of their deed of settlement, such purposes to be carried into effect and the business to be managed by boards of directors and by general meetings in manner there prescribed. *Primâ facie* there is nothing more inconsistent with the whole scope and character of such a body than that it should enter into a contract of partnership with any other person or persons in any other business whatever. It would require very clear powers to enable a man's partner or partners, or, in a joint stock company, his delegated officers, or the majority of his co-shareholders, to make him a partner with any other person or a shareholder in any other society. But if the society, in its *quasi* corporate character, could take shares in another partnership or body, it would in effect be to make every shareholder a partner or shareholder in such partnership or body. In the deed of settlement in this case there is express power to invest the funds of the society not immediately required in shares. But the language of that clause goes far to negative any such power to invest generally in shares or in a partnership. It is only as an investment of surplus funds that it is permitted to purchase shares, and shares only in docks, &c., things that are mentioned in the articles, established by Act of Parliament, in substance, interests in real estate; nothing, in fact, like a partnership in some other business speculation or adventure. It was put to counsel in the course of the argument whether it could possibly be contended that such a society as this could take shares, or become a partner in a society or partnership for brewing or mining, or buying and selling of merchandise, and it was admitted that it would be difficult so to contend. But in truth, the more or less similarity of the objects, or even absolute identity of the objects, does not affect the principle. It is the entering into a new contract of partnership with new persons under a new constitution, which is absolutely *ultrâ vires* and void, unless specially provided for and authorized.

But it is suggested that there is such special provision and authority in this case. By the 45th article of the deed of settlement it is provided, "that an extraordinary general meeting may accept or take a transfer of or purchase or acquire the business of any other associations, companies, or societies of a similar nature

wholly or in part with the association hereby established, upon and under such terms, conditions, stipulations, and agreements as such meeting shall think fit."

It is said that it was, and in truth it appears to have been, competent for the society to purchase the business of the *Commercial*, and that it was a proper term and condition of the purchase of an entire business, that the purchasing company should take the shares of the selling company. It would probably be sufficient to say that it was not one of the terms and conditions of the agreement that the association should take, itself, a transfer of the shares.

Neither the selling company nor the buying company nor the transferring shareholders contemplated such a mode of dealing with the matter. The latter, probably, would have been advised to have nothing to do with such an attempt. What was done was to find individual transferees capable clearly of accepting and holding the shares. And the latter were the officers and managers of the society and their friends, who were anxious to promote the scheme, and were willing to take what they probably then thought an inappreciable risk, having the indemnity of their own association. That was the transaction as it was arranged, and as it was carried out.

But it must be held, we think, that the power to take a transfer of or to purchase a business on such terms, conditions, stipulations, and agreements as the meeting should think fit, could not, under the guise of a condition or stipulation, sanction every dealing and transaction that it might be thought fit to enter into contemporaneously with it. It could not under that guise sanction something so entirely at variance with the whole constitution and principle of the association as to make those shareholders who had carefully limited their liability so far as they could do it to £10 per share, shareholders in another society with a liability to £50 a share. By their constitution it was stipulated that every document binding them shall contain certain express reference to the provision making the funds and property and subscribed capital of the society alone liable, and declaring that the shareholders should only be in fact liable to pay calls on their subscribed capital. Even the power given to two successive general meetings to

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amend the laws was carefully guarded so as not to extend to any alteration enlarging the individual responsibility of the shareholders. And it would be against all reason to hold that a general meeting purchasing a business from another society should have the power to accept, either in terms, or by implication, a condition or stipulation that in respect of such purchased business the shareholders should be liable to a totally different extent, and on a totally different principle, from the liability under which they stood on business of the same kind originally entered by their own officers. If such a condition were expressed in terms it would at once shock the mind of any person to whom it was submitted.

The transaction as it was carried out was reasonable enough. The purchasing company was to the whole extent of its funds and property liable to discharge the liabilities of the selling company, just as it was liable to satisfy its own similar contracts, and there being no novation, the mode in which it assumed that liability was by giving an indemnity to the selling company and its shareholders.

As part of the same indemnity, it became liable to save harmless its own nominees who took transfers of shares in order to facilitate the purchase. But that was only the same liability in another form, namely, the liability to discharge the contracts connected with the transferred business out of the same funds, property and capital, out of which all their other contracts were to be satisfied. That was how things stood when the deed of 1864 was made, and when it was attempted thereby to vest the shares in the association itself. Where was there any authority for that deed? The expressed object of the deed was in fact not to vest the shares, *qua* existing and continuing shares in the association, but to merge and extinguish the shares, and it is not unworthy of notice that in that very deed the covenant to indemnify such transferring shareholders is expressly limited to the funds and property of the association. It is beyond all question that the trustees, directors, and managers of the association could not by their own act, by means merely of their own physical possession of the common seal, alter their position towards their *cestuis que trust*. The deed of 1864 was an entirely internal matter. Before the execution of that

deed the shareholders, parties thereto, were liable as such, with an indemnity out of the funds. They had no power, as between them and the association, to transfer their own liability to the latter. And no other person or body of persons could be prejudiced or benefited or affected by an instrument to which they were absolutely strangers, such instrument being void as between the parties to it.

It was argued, however, that this transaction became binding by reason of the entry of the association as owners of the shares in the books of the *Commercial*, and by the inrolment in Chancery of a memorial of the assignment to the association and the acquiescence of the *British Nation* shareholders therein. It was said that this was like *Peek's Case* (1), that the *British Nation* were at the time of winding-up *de facto* the shareholders, and that, whatever equity they might have had before the winding-up to be relieved from their shares, they could not, after the winding-up, assert such equity.

That case, however, has no application if the preceding reasoning is sound; this is not the case of a person induced to become a shareholder, and who had become a shareholder by fraud—but of persons who say truly they never were shareholders.

They never accepted their shares, and if that be so, the entries in the books of the company and the inrolment of the memorial in Chancery were wholly inoperative as to them.

Such entries and memorial are as void as the transaction itself. It is not unimportant to observe that the entries in the books are without date; and that the memorial was not inrolled until the 1st of September, 1865, several months after both the *Commercial* and the *British Nation* had practically ceased to exist, the latter having on the 16th of March, 1865, become amalgamated with, and merged in, the *European*.

And with regard to the alleged acquiescence there are no facts from which any such acquiescence can be inferred. It is found in the case that the deed of 1864 was not submitted to any general meeting, and it is not found, and does not appear, that it was in any other manner made known to the shareholders generally, or that anything was ever done by any one on the faith of or in reliance

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on such deed, or in consequence of it, except the above-mentioned entries and memorial which have been already dealt with.

But it is lastly contended that the *British Nation* became equitably liable as contributories. It is said that, under the 200th section of the Act of 1862, all persons legally or equitably liable to contribute to the assets are contributories, and may be put on the list as such. It is impossible to hold that any person who is a debtor to the company in liquidation can be put on the list of contributories. He is bound to pay moneys, which moneys, when paid, will be part of the assets of the company, and in that sense he is liable to contribute to the assets, but that does not make him a contributory within the meaning of the Act. Again, a person who has taken shares in the name of a trustee is, as between him and his own trustee, the person liable to contribute, but that does not make him a contributory as between him and the company. The company may get at him, as it has in several instances, through and in the name of the trustees. But still the equitable liability is to the trustee only, and there is no privity or direct right of any kind as between the company and the *cestui que trust*. If an officer of the company has misappropriated assets, he may be made to refund them to the liquidator as part of the assets, but that does not make him a contributory. The plain meaning of the Act is a legal or equitable liability to contribute in the character of a partner. A person who has not taken shares may have become bound in equity to the company to take shares. A person who has by some device or contrivance got rid of his shares may be made to take them again. These are instances of the equitable liability to which the Act refers.

But if the *British Nation* did not become actual legal shareholder, it never became under any equitable obligation to the *Commercial* to take shares. It never dealt with the *Commercial* at all in its *quasi* corporate character in respect of the shares. The shares were dealt with by the individual owners of the shares, who alone had a right so to deal.

There was, however, a very substantial equity as between the two companies arising out of the transaction itself. As between the selling company and the purchasing company, the latter became primarily liable to fulfil the contracts of the former, which

has a right to enforce such liability. But as between two such bodies, each of which must be taken to have known the constitution of the other, and indeed without such knowledge, the equitable liability could not extend beyond the legal liability which it would have been *intrà vires* to give by express covenant, namely, a liability to fulfil such contracts *pari passu* with its other contracts and out of the same funds.

And that liability has, we are told, been actually so dealt with in the winding-up, that is to say, the policies and other obligations of the *Commercial* have been let in to participate *pari passu* in the distribution of the assets of the *British Nation*.

The result will be to allow the appeal and discharge the order of the arbitrator putting the *British Nation* on the list of contributories of the *British Commercial*.

The arbitrator will deal with the costs of the appeal as he has done in other cases.

Solicitors: *John Tucker ; Mercer & Mercer ; Wilkins, Blyth, & Fanshawe ; Carr, Bannister, & Co. ; G. L. P. Eyre & Co.*

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GOVERNORS OF MAGDALEN HOSPITAL v. KNOTTS.

[1876 M. 243.]

Charity—Voidable Lease—13 Eliz. c. 10, s. 3—Eleemosynary Corporation—Statute of Limitations—Presumption of Possession under Rightful Title—Counterpart of Lease—Evidence.

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In the year 1783 the Governors of *Magdalen Hospital*, a charitable society incorporated in 1768, granted a lease of property belonging to the hospital for ninety-nine years to a lessee at a peppercorn rent. In 1876 the governors of the hospital brought an action against the Defendants, who were then in possession of the land, asking for a declaration that the lease was void under the 13 Eliz. c. 10, s. 3, and to be put into possession of the property. No proof was given by the Plaintiffs that the Defendants claimed their title to the land under the lease:—

Held (affirming the decision of *Fry, J.*), that the counterpart of the lease produced by the Plaintiffs was evidence against the Defendants of the execution of the lease, and that the Plaintiffs were owners of the freehold of the land; and that in the absence of proof that the Defendants claimed under

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any other title, there was a presumption that their title was derived under the lease :

Held, also, that the hospital, although an eleemosynary and not an ecclesiastical corporation, was within the statute 13 Eliz. c. 10, and that the lease was voidable under the 3rd section :

But *held*, that the right of action to recover possession of the land accrued to the governors of the hospital at the date of the execution of the lease, and that the action was now barred by the *Statute of Limitations*.

Governors of Magdalen Hospital v. Knotts (on demurrer) (1) reversed.

Confirmed by H.C. 4 Aff. Cas. 324
THE Plaintiffs in this action were a charitable corporation, founded in the year 1758 as a voluntary charitable society for establishing a house for the reception, maintenance, and employment of penitent prostitutes, and incorporated by an Act 9 Geo. 3, c. 31 (the *Magdalen Hospital Act*, 1768), under the name of *The President, Vice-Presidents, Treasurer, and Governors of the Magdalen Hospital for the Reception of Penitent Prostitutes*. The action was brought to recover possession of a house and premises known as *The Tower* public-house, situate in *Tower Street, Westminster Bridge Road*, in the county of *Surrey*, and in the possession or occupation of the Defendants, on the ground that a lease of the property for ninety-nine years, executed in 1783 by the corporation to one *Charles Gilbert* (through whom it was alleged that the Defendants derived title) was void under the Act 13 Eliz. c. 10, s. 3. The action was commenced on the 11th of July, 1876, with the sanction of the Charity Commissioners, against the Defendant *Knotts*, the tenant in occupation of the public-house. On the 26th of July, 1876, the Defendants, *R. M. Shaw*, *T. J. Shaw*, and *Sarah Shaw*, who claimed to be the landlords of the public-house, obtained leave to appear and defend the action, and on the 3rd of August, 1876, the Defendant *James Watney*, a member of the firm of *Watney & Co.*, brewers, who claimed to be mortgagees of the Defendant *Knotts'* interest in the property, also obtained leave to appear and defend the action.

The facts, as alleged in the statement of claim, were as follows :—

By an indenture of release, grounded on a lease for a year, dated the 21st of November, 1763, certain pieces of land were conveyed by *Thomas Clarke* to *Robert Dingley* and *Philip Miloway* in fee. The land thus conveyed was described in the

(1) 5 Ch. D. 175.

release as three pieces of pasture ground lying in the open and common fields, called *St. George's Fields*, in the parish of *St. George the Martyr*, in the county of *Surrey*, and containing by estimation six acres, but lying separate, and divided in three portions of three acres, two acres, and one acre. In a plan annexed to the deed, the larger plot of the three was stated to contain 3A. 9P. The land sought to be recovered in the action was part of the plot of two acres. Upon the release was indorsed a memorandum, dated the 6th of April, 1769, under the hands and seals of *Dingley* and *Milloway*, declaring that the lands therein comprised were purchased by them for the use and benefit of the corporation, and that their names were only used in the deed in trust for the corporation.

The Act of 1768, which incorporated the charity, recited the seisin of *Dingley* and *Milloway* on trust for the charity, and that four acres, part of the six acres, whereon it was intended to build the hospital, lay together in one plot, but that the said four acres could not be inclosed for that purpose unless certain rights of common thereupon were extinguished. And it was enacted that from and after the passing of the Act all rights of common in, over, or upon the said four acres of land lying together in one plot should be extinguished.

The Plaintiffs had not in their possession any conveyance of the legal estate in the hereditaments which at the date of the Act were vested in *Dingley* and *Milloway*, but the Plaintiffs had (as thereafter appeared) for many years acted as the legal owners of the hereditaments, and they submitted that at this distance of time a conveyance of the legal estate ought to be presumed. Soon after the passing of the Act a building for the purposes of the hospital was erected on the part of the land called in the Act four acres (which land in reality contained 3A. 9P.), and this building was until the year 1869 used for the purposes of the hospital.

By a lease dated the 4th of December, 1783, *Charles Gilbert* demised to the Plaintiffs' corporation, their successors and assigns, a piece of land in *St. George's Fields* adjoining the land of the hospital for the term of fourteen years from the 25th of March, 1783, at the yearly rent of £5.

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By another lease, also dated the 4th of December, 1783, which on its face purported to be made in consideration of the rent, covenants, and agreements thereafter reserved and contained on the part of *Charles Gilbert*, his executors, administrators, and assigns, the Plaintiff corporation demised to *Gilbert* "All those pieces or parcels of ground belonging to the said President, Vice-Presidents, Treasurer, and Governors situate, lying, and being dispersedly in *St. George's Fields*, in the parish of *St. George the Martyr*, in the said county of *Surrey*, not included within the site or wall of the present hospital, or the gardens or yards thereof belonging, together with, &c., as the same premises are now and have been for several years past in the tenure and occupation of the said *Charles Gilbert*," to hold the same from the date thereof for the term of ninety-nine years at the yearly rent of one peppercorn, if lawfully demanded. And *Gilbert* covenanted that he, his executors, administrators, and assigns, would from time to time, and at all times during the term, indemnify and keep harmless the lessors of and from all rates, taxes, duties, and assessments to be imposed on the said demised premises by Act of Parliament, or otherwise howsoever, and from all costs and charges relating thereto. *Gilbert* also covenanted to yield up the premises at the end or sooner determination of the term. These were the only covenants on the part of the lessee. There was a covenant by the lessors for quiet enjoyment. The site of *The Tower* public-house was included in this lease.

In 1794 the corporation demised to the assignees of *Gilbert*, who had become bankrupt in 1793, the same premises for a reversionary lease of fifty years, "to commence and be completed from and at the end of the said term of ninety-nine years, by the way of adding fifty years to the said term of ninety-nine years, and to be held at a peppercorn rent;" and in 1795 *Gilbert* and his assignees demised to the corporation a piece of leasehold land for fifteen years and a half at a peppercorn rent, both the last-mentioned demises being recited to be made in pursuance of an agreement to that effect in 1793.

The Plaintiffs alleged that the Defendants claimed under a derivative title from *Gilbert* and his assignees, the Defendant *Knotts* being the tenant in possession. Down to the issue of the

writ in this action no act had been done by the Plaintiffs to avoid either of the leases. The Plaintiffs claimed a declaration that the two leases were void under the Act 13 Eliz. c. 10, s. 3, so far as they affected *The Tower* public-house; possession of the house and premises; £105 for mesne profits from the date of the issue of the writ to the day of recovering possession; and further relief.

The Defendants demurred to the statement of claim on the ground that the Plaintiffs' right was barred by the *Statute of Limitations*. The Master of the Rolls overruled the demurrer (1), holding that the statute of *Elizabeth* operated to make the lease only voidable, and not void, and that the *Statute of Limitations* did not, therefore, begin to run until the Plaintiffs had taken some step to avoid the lease of 1783, *i.e.*, not till the issue of the writ in the action.

The Defendant *Knotts*, by his statement of defence, said that he was in possession of the property sought to be recovered, as tenant of the Defendants the *Shaws*, and he denied the several allegations of fact contained in the statement of claim. He also pleaded that the Plaintiffs' claim had been barred by the Statutes of Limitation.

The Defendants the *Shaws*, by their statement of defence, denied the allegations contained in the statement of claim, and in particular they denied that *Gilbert* entered under the alleged ninety-nine years' lease on the lands alleged to be comprised in that lease. They also denied that either *Gilbert* or persons claiming under him had been in possession of the said lands under the said lease to the present time. The Defendants said that they were in possession of the premises sought to be recovered by their tenant, the Defendant *Knotts*, and that they relied upon the *Statute of Limitations*; and they submitted they were not bound to set forth the title under which they claimed to be entitled to the premises sought to be recovered. They also said that they had been in possession of the premises for many years as purchasers for value without notice of the Plaintiffs' title, and that the Defendants and their predecessors in title had expended large sums in erecting buildings thereon and otherwise improving the same.

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The Defendant *Watney*, by his statement of defence, said that he was in possession of the land sought to be recovered by his tenant the Defendant *Knotts*, within the meaning of the Rules of Court, 1875, Order XII., rule 18, and Order XIX., rule 15. He did not admit the allegations in the statement of claim, but put the Plaintiffs to prove them strictly. He pleaded the *Statute of Limitations*, and also said that he was a purchaser for value without notice of the Plaintiffs' right.

After the statements of defence had been delivered, the Plaintiffs amended their statement of claim by adding an allegation that "the Defendants have never claimed, and do not by their statement of defence in this action claim or set up any title paramount to the title of the Plaintiffs or any title other than such derivative title as aforesaid."

The action came on for trial before Mr. Justice *Fry* on the 13th of November, 1877.

Argument.

Cookson, Q.C., and *Decimus Sturges*, for the Plaintiffs:—

The principal legal questions have been already decided by the Master of the Rolls upon the demurrer.

[*FRY*, J.:—I shall feel myself bound by that decision. The only question, therefore, is whether the Plaintiffs can prove their case.]

The Defendants say, in effect, that we must prove that the public-house was comprised in the lease to *Gilbert*, and that the Defendants are in possession of it through him. But, the Defendants being in possession, and shewing no title inconsistent with the supposition that they are in possession under the lease to *Gilbert*, the Court will presume that they are in possession under that lease by a rightful title rather than as mere squatters: *Doe v. Williams* (1). A tenant cannot by any act of his own alter the relation in which he stands to his landlord: *Archbold v. Scully* (2).

It is only a lease voidable at the lessor's election. If, as in *Chadwick v. Broadwood* (3), the tenant had paid his rent to a wrong person, the *Statute of Limitations* might operate, but here

(1) 6 B. & C. 41.

(2) 9 H. L. C. 360.

(3) 3 Beav. 308.

no rent has been paid at all. The counterpart of the lease will be evidence of the lease: *Doe v. Pulman* (1).

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It was then proved by Mr. *Currey*, the Plaintiffs' surveyor, that, assuming the execution of the lease of 1783, and assuming also that the Governors of the Hospital were at the date of the lease of 1783 still seised of all the lands which were conveyed to them by the deed of 1763, the property of which the Defendants were in possession formed part of the land comprised in the deed of 1763, and also part of that which was comprised in the lease of 1783. Mr. *Currey* also proved that the land on which the hospital was built was that which was described in the deed of 1763 as containing three acres, and in the plan to that deed as containing 3A. 9P.

The counterpart of the lease of 1783 was then tendered as evidence of the lease.

North, Q.C., and *Warmington*, for the Defendants the *Shaws* and *Knotts*:—

The counterpart is not evidence against us. It has not yet been proved that the land of which we are in possession was comprised in the lease. There is no legal presumption that the Governors continued the owners of the land conveyed to them in 1763 up to the date of the execution of the lease of 1783. But, if there be such a presumption, it is rebutted in this case. The deed of 1763 describes the land thereby conveyed as consisting of three plots containing respectively three acres, two acres, and one acre, and the plan annexed to the deed shews the larger plot as containing 3A. 9P. The Act of Parliament of 1768 says that the land of which the trustees for the charity were then seised consisted of two plots containing four acres and two acres. The inference from this is that the charity land was not then the same as that which was conveyed by the deed of 1763. This view is confirmed by the statement in paragraph 7 of the statement of claim, that the Plaintiffs have not in their possession any conveyance of the legal estate in the land which was vested in *Dingley* and *Milloway* as trustees for the hospital.

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Mr. *North* objects to the counterpart of the lease of 1783 being put in as evidence against him. He says that it is the only evidence of the identity of the premises which he claims and of the allegation that he is now in possession of property which is comprised in that lease.

He says that there is no presumption that the Hospital remained in 1783 the owners of the lands which were conveyed to them in 1763. Now upon that general question I determine against him. I hold that when there is evidence that land is conveyed to a particular person, there is, in the absence of anything to the contrary, a presumption that the land remained the property of the person to whom it was so conveyed. I hold that, in the absence of something to the contrary, the lands conveyed in 1763 must be presumed to have been still the lands of the Hospital in 1783.

Then Mr. *North* says that that presumption is in the present case rebutted, and he says it is rebutted by two circumstances, the first being the Act of Parliament. The deed of 1763 described the three parcels of land conveyed to the hospital trustees as containing respectively three acres, two acres, and one acre. The Act of Parliament recites the seisin of the same trustees of six acres of land, but it speaks of one piece of land as containing four acres, and the other two pieces as containing together two acres. Mr. *North* says that from that I ought to infer, at any rate, that the two pieces, which before had contained three acres, had then been diminished to two acres. If that were all, I do not think that I ought to make that inference. I think that I should be bound to hold, on the mere construction of the Act of Parliament and the deed of 1763, that the piece of land which is described in the deed of 1763 as containing three acres, or, as appears upon the plan, 3A. 9P., was the same piece of land as that which is described in the Act as containing four acres.

But the matter does not stop there, because the evidence of Mr. *Currey* identifies the parcel which is described as 3A. 9P. in the deed of 1763, and as four acres in the Act, as being the piece of land now containing 3A. 9P., on part of which the hospital was built; and it is to be borne in mind that the Act describes the four acres as being intended for the site of the hospital. It is

evident, therefore, that that intention was carried into effect, and that what is described as four acres in the Act is identically the same piece of land as in 1763 contained, and now, in 1877, contains, 3A. 9P.

But Mr. *North* also says that the fact that no conveyance of the legal estate by the trustees is to be found confirms his suggestion that there had been a conveyance of a portion of the property to other persons. In my opinion it does not, and for this reason, that the fact that no conveyance of the legal estates was made is of just the same import whether the trustees were seised of the whole or part of the property originally conveyed to them; it neither prevents the presumption from arising nor supports in any way the inference that there had been a conveyance of a portion of the land to strangers.

I rule, therefore, that there is nothing to rebut the presumption, and that the evidence before me justifies the admission of the counterpart of the lease as evidence against the Defendants.

North, Q.C., and *Warmington*, for the same Defendants:—

Another objection to the admissibility of the counterpart is that there is nothing to shew that we claim under *Gilbert*. It cannot be presumed that *Gilbert* ever entered under the lease. That distinguishes the present case from *Doe v. Williams* (1). The admission in the lease that *Gilbert* was then in possession of the property cannot be read as against us until the lease is proved.

Cookson, Q.C., and *Decimus Sturges*, for the Plaintiffs:—

Doe v. Murless (2) is another authority to shew that the counterpart is admissible. We are not bound to prove entry under the lease. The mere fact that there is a lease and that the Defendants are in possession raises the presumption that *Gilbert* entered under the lease, and that the Defendants have derived their possession through him.

North, in reply:—

The Plaintiffs are asking the Court to assume that there is a lease, which is the very thing they have to prove. The fact that

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(2) 6 M. & S. 110.

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we are in possession is *primâ facie* evidence that we are owners in fee, not for a term.

FRY, J.:—

The Defendants are in possession of the property, and they say that that raises the presumption that they are owners of it in fee. Assuming that to be so, it must be borne in mind that it has been already proved to my satisfaction by the Plaintiffs that the Plaintiffs became the owners of the property in 1763, and I have already held that the presumption follows that they are still the owners. The effect of the document which is tendered in evidence is or may be to convert the possession of the Defendants into a rightful possession. I think, therefore, that I must admit the counterpart as evidence, because I think that the presumption is that the Defendants' title is a rightful one, and it will be made a rightful one and consistent with the Plaintiffs' title, if that document be admitted, and if it be presumed against the Defendants that an entry was made by the lessee under the lease, and that they are in possession by some title deriving its force from the original lease.

I therefore admit the document, and presume as against the Defendants that the original lessee entered, and that the Defendants claim by devolution from him.

The Defendants then put in evidence a deed of the 21st of March, 1875, which was a lease of the property by *Thomas John Shaw* and *Sarah Shaw* to *Charles Jones* for thirty-five years from the 25th of December, 1874, the rent being reserved to the lessees, their heirs and assigns; a deed of the 22nd of April, 1875, which was an assignment of that lease to the Defendant *Knotts*; a deed of the 22nd of March, 1869, by which *R. M. Shaw* and *T. J. Shaw* purported to mortgage the property in fee to *J. J. Welch*; and a deed of the 20th of January, 1858, by which *Robert Shaw* demised the property to *G. T. Saltmarsh* for twenty-five years from the 25th of December, 1857, the rent being reserved to the lessor, his heirs and assigns.

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*North*, Q.C., and *Warmington*, for the same Defendants:—

As a matter of form we raise the defences which were urged



before the Master of the Rolls upon the hearing of the demurrer. The evidence we have adduced is sufficient to rebut the legal presumption against us.

*Cozens-Hardy*, for the Defendant *Watney*.

FRY, J:—

The principal legal questions arising in this case have been determined by a demurrer which was argued before and decided by the Master of the Rolls. He overruled the demurrer, and held that the Plaintiffs had on their statement of claim disclosed a case which proved them to be entitled to relief.

The question, therefore,\* before me is, whether that statement of claim has been upheld by the evidence.

The various points urged by way of objection to the Plaintiffs' title have for the most part been disposed of during the course of the argument, and one point only remains which requires attention. I have admitted the counterpart of the lease of 1783 as evidence against the Defendants. I have presumed against them that there was an entry under that lease, and that they claim in some way by devolution from the lessee under that lease. Mr. *North* now says that he has made out a case which rebuts the presumption which I so raised against him, and he puts it shortly in this way: From the 20th of January, 1858, down to nearly the present time there have been acts by the Defendants, or by those under whom they claim, which asserted in them a freehold title. For instance, by the deed of the 20th of January, 1758, *Robert Shaw*, who appears to have been ancestor in title to the Defendants the *Shaws*, granted a lease to a certain Mr. *Saltmarsh*, and thereby reserved the rent to himself, his heirs and assigns. Similarly, in 1869, the two *Shaws* mortgaged the two-thirds which they appear to have derived under their father's will to a Mr. *Welch*, and affected to mortgage it in fee. It is said that this evidence of the acts of the persons in possession by which they asserted themselves to be owners in fee rebuts the presumption which I raised against them that they have derived their title from the lessee of the Plaintiffs. I do not think it does. It must be borne in mind that the lease of 1783 was executed many

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years ago, that no beneficial rent was payable under it, and further, that it imposed upon the lessee no onerous covenants, and did not require him to do anything which in the case of ownership in fee would not have been done. There was, therefore, nothing to remind the lessee and those claiming under him of his title, and it may well be that the recollection of that title and its leasehold character was lost. It appears, in short, that the acts which are proved by the Defendants do not enable me to say that the presumption which I raised against them has been rebutted. That being the only question on the evidence which I did not dispose of during the opening, I determine it also against the Defendants, and consequently I must give judgment in the terms asked.

I must make one other observation. It does appear to me that this is a very hard case upon the Defendants, and I should be very glad if the Plaintiffs should be able to recollect that charity may be shewn to publicans as well as to sinners.

C. A. From this judgment the Defendants appealed. The appeal came on to be heard on the 26th of April, 1878.

Argument. Sir *H. Jackson*, Q.C., and *Cozens-Hardy*, for the Defendants  
*Watney* and *Knotts* :—

The principal point argued before Mr. Justice *Fry* was, whether, as between the Plaintiffs and the Defendants, the Plaintiffs had made out their title to the reversion of the land held by the Defendants. On that point we urge that the counterpart of the lease was improperly received in the Court below as evidence against the Defendants.

*Cookson*, Q.C., and *Decimus Sturges*, for the Plaintiffs :—

This is a renewal of the objection to the reception of evidence admitted at the trial. The Appellants cannot renew that objection on the appeal from the judgment. They ought to have moved for a new trial for wrong admission of evidence.

JAMES, L.J. :—This is not an appeal from the finding of a distinct issue by the Judge. It is an appeal on all points of law and fact

on the trial of the whole case. The objection to the reception of the evidence can therefore be properly raised. ] C. A.  
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Sir *H. Jackson*, Q.C., and *Cozens-Hardy* :—

We admit that the counterpart would have been evidence against *Gilbert* of the title of his lessors, and that the lease was executed, and that he had entered under it, but the Plaintiffs have not connected the possession of the Defendants with *Gilbert*. There is no evidence of any privity between the Defendants and *Gilbert*, or that the Defendants are in possession under the lease. *Primâ facie*, their position raises a presumption that they had the fee simple, and there is no evidence to rebut that presumption. The mere existence of a lease of the same land to *Gilbert* is not sufficient, for the lease may have been surrendered: *Sugden v. Lord St. Leonards* (1); *Doe v. Murless* (2); *Doe v. Williams* (3).

The main questions in the suit, namely, if the lease of 1873 was void or voidable under the statute of *Elizabeth*, and if so, if the Plaintiffs are barred by the *Statute of Limitations*, were not argued before Mr. Justice *Fry*, who considered himself to be bound by the decree of the Master of the Rolls on demurrer. These questions are, however, open on this appeal.

We therefore contend, first, that the lease of 1873 was not invalid under the 13 Eliz. c. 10, s. 3. That statute was passed for the purpose of preventing incumbents of ecclesiastical benefices and the heads of ecclesiastical corporations from making leases for their own benefit to the prejudice of their successors. It was not intended to prevent an aggregate corporate body like the Plaintiff corporation from making leases for the benefit of the whole body. The evidence shews that this lease was not an improvident lease, and the existing members of the corporation when it was granted got no greater benefit from it than their successors: *Magdalen College Case* (4). In the second place, it does not apply at all to corporations subsequently created by Act of Parliament. Corporations like *Magdalen Hospital* were unknown at the date of the Act. Hospitals then were religious houses for the reception of monks and others for offering prayers, and for giving casual relief to the

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(1) 1 P. D. 154.

(3) 6 B. & C. 41.

(2) 6 M. & S. 110.

(4) 11 Rep. 66, b; 1 Roll Rep. 151.

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poor, not for reforming the vicious. This is confirmed by the 14 Eliz. c. 14, which explains and extends the provisions of the former Act to the "master or guardian" of all hospitals, *maisons dieus*, beade houses, and other houses ordained for the sustentation or relief of the poor": *Crossley v. Arkwright* (1).

[JAMES, L.J., referred to *Ex parte Arrowsmith* (2).]

But if the Court should be of opinion that the lease was within the provisions of the 13 Eliz. c. 10, we rely upon the operation of the *Statute of Limitations*. The lease, if within the statute of *Elizabeth*, was void *ab initio*. If such a lease was granted by a corporation sole or by the head of a corporation aggregate, it has been held that it is not void *ab initio*, but is good as against the grantor, but may be avoided by his successor: *Coke* upon *Littleton* (3). But here the lease was granted by the corporation aggregate without a head; it was therefore void *ab initio*: *Morrice v. Antrobus* (4); *Chapter of Southwell v. Bishop of Lincoln* (5). But if it was voidable only, the Plaintiffs are still barred by the statute, for the statute would begin to run from the time when the right to make an entry or bring an action accrued, which would be immediately after the grant of the lease, or at any rate, at the end of twenty-one years from that time: *Roe v. Archbishop of York* (6); *Doe v. Burrell* (7); *Pennington v. Cardale* (8); *Magdalen College, Oxford, v. Attorney-General* (9); *Attorney-General v. Davey* (10); *Attorney-General v. Payne* (11).

*Warmington*, for the Defendants *Shaw*.

[JAMES, L.J.:—We only desire to hear counsel for the Plaintiffs on the defence of the *Statute of Limitations*.]

*Cookson*, Q.C., *Davey*, Q.C. (*Decimus Sturges* with them), for the Plaintiffs:—

If the Plaintiffs' contention is correct, every such lease would become unimpeachable twenty years after it was granted, which

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| (1) 2 T. R. 603.           | (6) 6 East, 86.        |
| (2) Ante, p. 96.           | (7) 12 Q. B. 1011, n.  |
| (3) 45 a.                  | (8) 3 H. & N. 656.     |
| (4) Hardr. 325.            | (9) 6 H. L. C. 189.    |
| (5) 1 Mod. 204; 2 Mod. 56. | (10) 4 De G. & J. 136. |
|                            | (11) 27 Beav. 168.     |



would entirely defeat the intention of the statute. All the authorities shew that such a lease is not void *ab initio*, but voidable. *Magdalen College, Oxford, v. Attorney-General* (1) was a case in which there had been a breach of trust, and is not at all applicable to the present case. *Pennington v. Cardale* (2) is in our favour. Then, if the lease was voidable, at what time did the right to bring an action commence? Surely not till the lessors declared their election to avoid the lease. Until that time there could be no adverse possession. In the present case the Plaintiffs did not exercise their election till the issuing of the writ; that must therefore be the time when the statute began to run. It is the same as if the lease contained a proviso that the lessor might at his option re-enter at any time. In such a case there would be no adverse possession till the lessor had exercised his option to enter.

Sir H. Jackson, in reply.

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1878. April 16. THESIGER, L.J., delivered the judgment of the Court (*James, Cotton, and Thesiger, L.JJ.*). Judgment, C. A.

After stating the facts of the case as set forth above, his Lordship continued:—

The action subsequently came on to be tried before Mr. Justice Fry, when the counterpart of the lease of 1783 was put in evidence, the identity of the parcels being proved by Plaintiffs' surveyor. It was objected that the lease without proof connecting the Defendants with the lease was not evidence of title against them; but the learned Judge overruled the objection, and, after finding that certain acts of ownership on the part of the Defendants, such as leases and a mortgage in fee which were proved to have taken place between 1858 and 1875, but which have properly not been relied on in argument in this Court, did not displace the Plaintiffs' proof of title, and holding that he was bound by the decision of the Master of the Rolls on the questions which were the subject of the demurrer, gave judgment to the effect already referred to. The Defendants contend that his judgment is erro-

(1) 6 H. L. C. 189.

(2) 3 H. & N. 656.

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neous, first, on the ground that the Plaintiffs did not, as against the Defendants, make out a title to the premises sought to be recovered. They urge that the fact of the execution of the lease of 1783, although it might be good evidence of title in the Plaintiffs as against the original tenant and persons claiming under him, is not admissible to prove, and does not prove, against the Defendants, the origin of whose possession is not affirmatively shewn, either the creation of the term or its continuance, or raise any presumption of privity in the Defendants to such term. But this contention is not a well-founded one. The fact of the execution of the lease was admissible as proof of an act of ownership on the part of the Plaintiff corporation, *primâ facie* evidencing a title in fee, and the Defendants being admittedly in possession of land included in the lease, the law will refer that possession to a rightful rather than a wrongful title. There being then a course through which title may be lawfully derived, viz., by supposing the Defendants to be privy to the term, their possession will be *primâ facie* referred to that privity, and if it be in fact referable to some other title, it is for those within whose knowledge the matter is to prove the fact: *Doe v. Murless* (1).

Failing this first contention, it has been next argued on the part of the Defendants that the *Magdalen Hospital* is not within the provisions of the 13 Eliz. c. 10, as explained by 14 Eliz. c. 14. It is true, as has been pointed out by the Defendants' counsel, that the preambles to the sections of the former Act shew that it was primarily directed against "ecclesiastical persons," to use the words of the 1st section, or "persons having spiritual promotion," to use the words of the 2nd section, but the expression "guardian of any hospital" found in the Act is wide enough to include lay persons and to extend to secular institutions; and although in 1571 hospitals, whatever might be the main purpose of their foundation, were no doubt very commonly connected with spiritual ends and governed by ecclesiastical persons or persons having spiritual functions, we see no ground for confining the Act to the case of hospitals so connected and governed, and are of opinion that a modern statutory corporation forming the governing body of a hospital such as *Magdalen Hospital* is within the purview and

(1) 6 M. & S. 110.

subject to the provisions of the Act passed in that year. The later Act, 14 Eliz. c. 14, so far from militating against this view, rather strengthens it, for, on the one hand, it is clear from its scope and object that it must not be construed so as to limit the meaning which might, apart from it, be reasonably given to the expressions used in the earlier Act; and, on the other hand, looking to the mention in the preamble of the hospitals of *Christ's*, *Bridewell*, *St. Thomas*, and *St. Bartholomew*, and the diverse character of those institutions as they even then existed, and to the inclusion in the last clause of the Act of "all hospitals, *maisons dieus*, beade houses, and other houses ordained for the sustentation or relief of the poor," the argument in favour of giving a wide interpretation to the expression "guardian of any hospital" becomes very strong. That it is large enough to be applicable to the present case would be our opinion upon the mere construction of the statutes and apart from the opinions of others; but in the words of Vice-Chancellor *Shadwell* in *Attorney-General v. Glyn* (1), "I have always understood that it is quite a settled point that a lease that is made by an eleemosynary corporation, though not ecclesiastical, is within the operation of the statutes."

It is not, and could not reasonably be, disputed that if *Magdalen Hospital* and its governors are within the operation of the statutes of *Elizabeth*, the lease of 1783 is one prohibited by those statutes, and the Plaintiff's title being established, the only remaining question is whether the Plaintiff's right of action to recover possession of this property pending the lease is barred by the *Statute of Limitations* (3 & 4 Will. 4, c. 27). In dealing with this question we treat the lease as voidable only, and not void, pursuant to what was undoubtedly a principle of the decision, and not a mere *obiter dictum*, in the considered judgment in *Pennington v. Cardale* (2), and pursuant to the general principles of law applicable to forfeitures for breach of covenant and other analogous cases. But although the lease may be voidable only, is there any reason why sect. 2 of the statute should not be held to apply, so as to make the period of limitation run from the time of the granting of the lease where, as here, an action of ejectment might have been commenced the very day it was granted? It has been argued on the part of the

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(1) 12 Sim. 87.

(2) 3 H. &amp; N. 666.

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Plaintiffs that the right to re-enter, and consequently to bring an action, does not arise in a case like the present until the mind of the lessor determines to avoid the lease, and that the issuing of the writ, although not the actual election itself, is an overt act evincing the election to avoid, and making the right of action accrue only upon the election so evinced, *i.e.*, upon the commencement of the action; but this argument appears to us to be a mere speculative refinement, not consistent with fact or reason. As a matter of fact it is admitted that no election need be proved to have existed, still less to have been communicated to the lessee, and that the supposed election has no real existence at all apart from the writ. Why, then, is an election to be presumed other than the election which is constituted by the action itself? And if the action requires no precedent act to support it, how can it be said that the right to bring such action does not accrue as soon as the lease is made?

In the case of a tenancy at will prior to the 3 & 4 Will. 4, c. 27, time did not run against the lessor, for the reason that no action of ejectment could be brought until lawful possession under the tenancy was determined by a demand of possession or other specific act evidencing and expressly or impliedly communicating to the tenant the intention to determine the tenancy; but even for that case the Legislature has made provision in the 7th section of the Act, and time now runs either from the actual determination of the tenancy or from the expiration of one year after its commencement, at which time it is to be deemed to have determined. It would seem strangely unreasonable that the statute should apply to a case where a right of action has not in fact or in law existed at any time, and where the tenancy has never been anything but a lawful tenancy, not subject to avoidance although capable of immediate determination, and should not apply to the case of a term declared by statute to be "utterly void and of none effect to all intents, constructions, and purposes," and which, even though voidable only, can be avoided and put an end to at any moment by the mere issuing of a writ. The words of the 2nd section are wide enough to prevent such an inconsistency. Why should they not be read so as to prevent it? Again, the event of a person becoming entitled to land by reason of any forfeiture or breach of



condition is expressly provided for in the 3rd section of the Act, the right being deemed to have accrued when such forfeiture was incurred or such condition was broken. But in cases coming within this provision the right of entry or action does not, strictly speaking, any more than in the present case, become absolute in the absence of an election on the part of the person claiming the land to take advantage of the forfeiture or breach of condition, although no other election than that constituted by the issuing of a writ is necessary to be proved. Such cases, therefore, are strictly analogous to the present one, and it is difficult to conceive that the statute could have been intended to make a distinction between them. The maxim "*Expressio unius exclusio alterius*" is not applicable here, for the object of the 3rd section is not to cut down or limit the meaning of the 2nd, or even to give a complete explanation of the terms used in that section, but to explain and give a construction to the enactment contained in the 2nd section in certain cases really coming within that section, but in respect of which there might be a doubt as to when the right of entry or distress or action first accrued: *James v. Salter* (1). The mention, therefore, in the 3rd section of cases of forfeiture or breach of condition, so far from being an argument for excluding from the operation of the 2nd section the case of a lease voidable by law from the moment of its inception, is rather an indication of the intention of the Legislature to extend the statute to such a case, and affords an illustration of the manner in which its provisions should operate. It is to be observed, also, that the statute speaks not only of the right of action but of the right of entry, and, in truth, where the claim is to the possession of land, the real right is the right of entry, and the right of action is only given to enforce the right of entry. By the theory of the law a man who is entitled to the possession of land in the actual occupation of another has a right, if he can do it peaceably, to eject the intruder and to put himself in his place; and it is on the theory and assumption that he is prevented from so righting himself that he appeals to the Sovereign to do him right and put him in possession. The old action of ejectment accordingly had its fiction of lease, entry, and ouster.

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(1) 3 Bing. N. C. 544.

C. A.      The real right being the right of entry, when did that right  
 1878      accrue? Not on demand or notice, for no demand or notice is  
 GOVERNORS OF necessary; and not on the entry itself, for the entry is in asser-  
 MAGDALEN tion of the pre-existing right. Where a lease is voidable the  
 HOSPITAL      right is not to enter and thereby avoid the lease, but to take  
 v.      possession notwithstanding the lease, treating the lease as void,  
 KNOTTS.      and when that right accrued, then there was the right of entry  
 Judgment, C. A.      within the meaning of the statute. If that be so, then in the  
                  present case, where there is no personal disability, the right of  
                  entry, and the consequent right of action, existed the moment that  
                  the lease of 1783 was granted, and from that moment the period  
                  of limitation began to run. We refer to the fact of there being  
                  no personal disability because, of course, the observations which  
                  we have made as to the immediate accrual of the right of entry  
                  and action would not apply in a case where the voidable lease is  
                  made by the head of a corporation within the statute of *Elizabeth*,  
                  for such lease cannot be avoided while he continues the head; and  
                  in such a case the *Statute of Limitations* will begin to run only  
                  from the time when he ceases to be head, that being the earliest  
                  period of time at which the lease can be avoided. So far we have  
                  considered this question apart from authority.

On behalf of the Defendants, three decided cases have been cited, viz., *Magdalen College v. Attorney-General* (1); *Attorney-General v. Davey* (2), and *Attorney-General v. Payne* (3). In the first, the House of Lords decided that charities were within the operation of 3 & 4 Wm. 4, c. 27, and that a lease for ever, subject to a rent, of certain lands held for charitable purposes, even if in its inception unauthorized by the trusts of the particular charity, could not as against the lessee be impeached in a suit by the Attorney-General, representing the *cestuis que trust*, except within twenty years. In *Attorney-General v. Davey* the decision in *Magdalen College v. Attorney-General* was held to govern a case where charity land had been held under a lease for 500 years granted in breach of trust, and in *Attorney-General v. Payne* the decision of the House of Lords was further applied to the case of an improvident lease granted by a charitable corporation. These cases were

(1) 6 H. L. C. 189.

(2) 4 De G. &amp; J. 136.

(3) 27 Beav. 168.

distinguished by the Master of the Rolls in his judgment in the present case, and have been distinguished in argument before us on the ground that in them, to use the words of the Master of the Rolls (1), "there was a right to impeach the lease upon equitable grounds immediately after it was granted. It was not like a case of avoidance, it was an original defect in granting the lease." There is, no doubt, some foundation for the distinction drawn. Where a lease is made in breach of trust, the avoidance of such lease takes effect *ab initio*, and may render the lessee liable to account for back profits, while the lessee under a voidable lease has a lawful possession until the lease is actually avoided, and is not liable in an action for mesne profits for anything prior to the avoidance. It may be said, therefore, that in the former case the possession is adverse throughout, while in the latter it only becomes adverse when the determination to put an end to it is communicated either by service of writ or otherwise. But the distinction referred to, although existing in point of fact, does not necessarily carry with it different legal consequences so far as the *Statute of Limitations* is concerned. That statute has got rid of the doctrine of adverse possession, and renders immaterial the inquiry into the nature of the possession of the person against whom the claim to land or rent is made. The question under it, and upon which the case of *Magdalen College v. Attorney-General* (2), and the cases following it, proceeded, is, whether twenty years have elapsed since the claimant's right of entry or action accrued; and if we are right in concluding that a lease voidable under the statute of *Elizabeth* may, equally with a lease in the granting of which there has been what the Master of the Rolls terms an original defect, be impeached by entry or action without any precedent act on the part of the person impeaching it, the principles of law which govern the one case are equally applicable to the other, and the decisions cited become authorities. In the one case the alienation is voidable in equity by the charity, the real owners, under the general law. In the present case the lease is voidable at law by the legal owners under the statute of *Elizabeth*. The anomaly would be great if in the one case time should begin to run when the right to avoid accrues, and in the other only when

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(1) 5 Ch. D. 182.

(2) 6 H. L. C. 189.



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the election to avoid is manifested by overt act. It cannot, at least, be denied that there is a considerable resemblance between the two classes of cases, and that the mischief intended to be remedied by the statute is to be found in the one as well as in the other; and when the argument for the Plaintiffs is reduced to so fine a point as that the writ in the action is to be looked upon as at once the machinery by which the action is commenced and the act by which the right to commence it is given, or at least evidenced, common sense would seem to demand that the Court should sweep away a refinement of this sort in favour of the simple view which carries out the objects of the statute and is at the same time consonant with its express language, that a right to issue a writ of ejectment to recover land held under a voidable lease, without proof of any prior act evidencing an election to avoid it, is a right to bring an action within the meaning of the 2nd section of the statute in question.

In coming to this conclusion we have been guided solely by the reasons which we have stated as the ground of our judgment; but it is at the same time satisfactory to us to feel that the interpretation which we have put upon the *Statute of Limitations* is one which prevents, in the present case and in cases of its kind, the infliction of very serious hardship. At this distance of time it is not easy to trace out what was the real consideration for the granting of the lease of 1783; but there is no reason for supposing that it was improvidently granted, while the circumstances set forth in the statement of claim point to its having been part of a series of arrangements under which exchanges of land were made and the Hospital received a benefit. But however this may be, the lapse of ninety years, during which large sums of money must have been expended upon the property which was the subject of the lease, and numerous transfers have taken place on the faith of the title under it not being disturbed, gives proceedings under the old statute of *Elizabeth* a very harsh aspect; and when it is considered that at the present moment there must be many titles which, if their origin in the remote past were inquired into, would be impeachable under the same statute but for the existence of some limitation upon the right of action, the convenience of applying the *Statute of Limitations* to such cases, and the *à priori* argument in favour of its being so applied, become apparent.



The order of the Court below must be reversed, and judgment must be entered for the Defendants with costs, including the costs of this appeal.

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Solicitors for Plaintiffs: *Wordsworth, Blake, Harris, & Parson.*

Solicitors for Defendants: *James, Curtis, & James; Pownall, Son, Cross, & Knott.*

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*Liquidation by Arrangement—Release of Trustee—Non-payment of Rent to Debtor's Landlord—Jurisdiction of Court of Bankruptcy—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 20, 53, 125, sub-s. 9.*

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May 2.

A debtor filed a liquidation petition on the 14th of September, and on the 3rd of October a trustee was appointed. On the 26th of November the creditors resolved that the trustee should sell the debtor's estate for a sum sufficient to pay the creditors 4s. in the pound; that the debtor's discharge should be granted on the filing of the trustee's certificate that the provisions of this scheme of settlement had been complied with; and that the close of the liquidation and the release of the trustee should take place on and from the 28th of January. On the 4th of January these resolutions were approved by the Court. The debtor was tenant of some business premises and some chattels for a term which expired on the 25th of December. The trustee took possession of the premises and the chattels, and remained in possession of them until the expiration of the term, but he did not pay the landlord the quarter's rent which fell due on the 25th of December. On the 26th of February the landlord applied to the Court of Bankruptcy for an order directing the trustee to pay him that quarter's rent. There was evidence that several applications had been made to the trustee for the rent in the course of January, and that he had said that he had left money with the debtor to pay it:—

*Held*, that either the landlord's remedy was a personal one against the trustee, in which case the Court of Bankruptcy had no jurisdiction in the matter, or that, if there was a remedy in the Court of Bankruptcy, the trustee had done nothing more than commit a default in the administration of the assets, from liability for which he was protected by the release, there being nothing to shew that there had been any fraud in obtaining it.

*Ex parte Société Cockrill* (1) distinguished.

Sect. 53 of the *Bankruptcy Act*, 1869, applies to a release given by the creditors to the trustee under a liquidation by arrangement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

Statement.

C. A.

1878

*Ex parte*  
CARTER.*In re*  
WARE.Statement.  

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On the 20th of May, 1868, *William Carter* granted a lease of a factory at *Stratford* to *Frederick Ware*, for a term of ten years, expiring at Christmas, 1877, at an annual rent of £87. On the same day *Carter* entered into a written agreement with *Ware* to let to him for the same term a steam-engine, machinery, and plant belonging to *Carter*, and which were upon the demised premises, at an annual rent representing 15 per cent. upon £470, the agreed value of the articles. It was also agreed that *Ware* should have an option to purchase the articles at the price of £470, payable by instalments. Until the full amount of the purchase-money had been paid the articles were to remain the property of *Carter*, but the rent was, upon the payment of each instalment, to be reduced by a sum equal to 15 per cent. upon the amount of such instalment. Prior to the 14th of September, 1877, *Ware* had given notice to exercise his option of purchase, and had paid *Carter* £170 in respect of the £470. On the 14th of September, 1877, *Ware* filed a liquidation petition. On the 15th of September *J. F. Lovering* was appointed receiver under the petition, and on the 3rd of October the creditors resolved upon a liquidation by arrangement, and appointed *Lovering* trustee, and as such trustee he took possession of the debtor's property, including the demised premises and the articles comprised in the agreement. On the 21st of September *Carter* gave notice to *Lovering* of his interest in the machinery and plant. On the 26th of November a meeting of the creditors was held in pursuance of a notice, dated the 16th of November, given by the trustee, at which it was resolved, 1, that the trustee should be authorized to concur in the following scheme of settlement of the affairs of the debtor; 2, that the trustee should sell the debtor's estate for a sum of money sufficient to pay the creditors a dividend of 4s. in the pound in satisfaction of their debts, to be paid within seven days from the date of the order of confirmation of the resolutions; 3, that the debtor's discharge should be granted on the trustee's certificate being filed that the provisions of this scheme of settlement had been complied with; 4, that the costs of the trustee and his solicitor should be paid by the debtor; 5, that the close of the liquidation and the release of the trustee should take place on and from the 28th of January, 1878. The trustee continued in possession of the

demised premises and the machinery and plant until the 25th of December, 1877. On the 4th of January, 1878, the Court of Bankruptcy approved the resolutions of the 26th of November, and ordered that they should be carried into effect.

On the 26th of February, 1878, *Carter* gave a notice of motion in the Court of Bankruptcy for an order directing *Lovering* to pay to *Carter* the sum of £33, being £21 15s. due in respect of the rent of the demised premises for the quarter ending at Christmas, 1877, and £11 5s. for a quarter's rent due at the same time in respect of the £300 remaining unpaid for the machinery and plant.

In support of the application, an affidavit was made by *John Hopkins*, a clerk of *Carter's* solicitor, in which he said that on the 8th of January, 1878, he applied personally to *Lovering* for payment of the £33, when *Lovering* intimated to him that he had left money with the debtor to pay the rent, and stated that, if written particulars were furnished to him, he would see that the debtor paid the rent, or, at all events, that it should be paid. On the 10th of January *Carter's* solicitor sent a letter to *Lovering* with full particulars of the £33, and demanded immediate payment thereof. On the 14th of January the solicitor wrote another letter to *Lovering* demanding payment of the £33 in the course of the following day. Repeated applications had been made to *Lovering*, verbally and otherwise, for payment of the rent, but he had neglected to pay it.

*Carter* himself made an affidavit, in which he said that prior to the 26th of December, 1877, the debtor, or his trustee, had removed all property belonging to the debtor from the premises, and he (*Carter*) was unable to distrain upon the debtor's effects. *Lovering*, as trustee of the debtor, or the debtor as his agent, made use of the machinery comprised in the agreement from the time of the commencement of the liquidation proceedings to the termination of the debtor's term. The Registrar refused the motion without costs. *Carter* appealed.

*A. C. Nicoll*, for the Appellant:—

Notwithstanding the release the Court of Bankruptcy has jurisdiction over the trustee: *Ex parte Société Cockrill* (1). The evi-

(1) 3 Ch. D. 115.

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*Ex parte*  
CARTER.

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CARTER.

*In re*

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dence in the present case shews that the trustee admitted that he had assets in his hands to pay the Appellant. The trustee might have disclaimed the lease.

[JAMES, L.J.:—Was not the liability a personal liability of the trustee, though he might be entitled to an indemnity out of the debtor's assets? And, if so, what jurisdiction has the Court of Bankruptcy?]

Section 20 of the Act provides that "the bankrupt, or any creditor, debtor, or other person aggrieved by any act of the trustee, may apply to the Court."

[JAMES, L.J.:—That applies to acts done by the trustee as trustee.]

The Appellant is aggrieved by the non-disclaimer of the lease by the trustee. He had, or ought to have had, assets in his hands to pay the rent when application was made for it. He had no right to get rid of the assets without providing for the rent. He was in possession of the property as trustee, and the landlord could not have sued him for the rent; the Court of Bankruptcy would have restrained him from doing so. *Ex parte Davis* (1) is distinguishable. The trustee in retaining possession of the property must be taken to have acted for the benefit of the debtor's estate, and the rent ought to be paid out of the assets, just as the costs of an unsuccessful application to the Court by the trustee would be paid.

[COTTON, L.J.:—If you were entitled to apply to the Court of Bankruptcy to be paid out of the assets, is not your right barred by the release under sect. 53?]

No, because the trustee has committed a fraud; he knew that the rent would be due, and yet he allowed the resolutions of the 26th of November to be passed without making provision for it. Moreover, the release has no operation as against the Appellant, who was not a creditor of the debtor for the rent. And, indeed, sect. 125, sub-sect. 9, of the Act shews that sect. 53 does not apply to a release by the creditors in a liquidation by arrangement.

*Winslow*, Q.C., and *Brough*, for the trustee, were not heard.



JAMES, L.J. :—

I am of opinion that the Registrar's order must be affirmed. The Appellant is in this dilemma: Either his remedy is a personal one against the trustee by reason of some personal contract on his part, in which case he has no remedy by means of any application in the Court of Bankruptcy, either against the debtor's assets or against the trustee; or, if the Appellant had any remedy against the trustee in the administration of the assets in the liquidation, the release of the trustee is by the Act expressly made a bar to any such application now. The case is not like *Ex parte Société Cockrill* (1), for there the money to pay the claimant's dividend was actually in the trustee's hands for his use.

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*Ex parte*  
CARTER.

*In re*  
WARE.

Judgment,  
James, L.J.

COTTON, L.J. :—

Cotton, L.J.

I am of the same opinion. I need only add that there is no ground for concluding that there was any fraud which could vitiate the release of the trustee. It appears from the evidence that the money to meet the Appellant's claim had been placed by the trustee in the debtor's hands, as his agent to pay the Appellant. That may have been a default by the trustee in the administration of the debtor's affairs, and, if so, it is covered by the release, unless it can be set aside, but it cannot be said that it was a fraud. The mere fact that a man is an insolvent is not a reason for supposing that he will commit a fraud when money is placed in his hands for the purpose of making a payment. But, if the trustee was liable for the default of his agent, his liability is covered by the release.

THESIGER, L.J. :—

Thesiger, L.J.

I am of the same opinion.

The appeal was dismissed with costs.

Solicitor for Appellant: *C. F. B. Birchall*.

Solicitor for Trustee: *W. G. Morris*.

(1) 3 Ch. D. 115.

C. A.

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V.-C. M.

June 12, 13, 18;  
July 23.

C. A.

1878

May 9.

YARROW *v.* KNIGHTLY.

[1875 Y. 12.]

*Will—Construction—Equitable Estate commensurate with Legal Interest—  
Fee Simple subject to happening of Event.*

A testator devised certain freehold property to trustees, their executors and assigns, in trust as to three freehold houses for the sole benefit of his two daughters *E.* and *S.*, either to live in or let for their joint benefit, and should either of his daughters die and leave no children or child, then either one of the houses, at the option of the survivor, to be sold, and the produce divided between the survivor and such of the testator's sons as should be living, but if either of his daughters should marry and have a child or children, then such child or children to have the mother's share of the rents and profits of the three houses after the mother's decease. On the death of one daughter without children one of the houses was sold, according to the direction in the will. The other daughter then died without children:—

*Held*, that the gift for the sole benefit of the two daughters of the testator gave them an estate commensurate with the estate in fee given to the trustees, and made them joint tenants in fee subject to executory gifts over in the event of their dying leaving issue; and that, this event not having happened, the joint tenancy in fee was unaffected, and the devisee of the survivor was entitled to the two unsold houses.

Statement.

THIS bill was filed for the administration of the estate of *William Smith Yarrow*. The testator, by will dated the 16th of January, 1826, gave and devised to *Robert Hill* and *James Hill*, his executors and trustees, all his five freehold houses, situate as follows:—His dwelling-house and garden, No. 3 *John's Terrace, Hackney*; his houses Nos. 65 and 63 in *Holywell Street, Shoreditch*; his house No. 2, also house No. 21, both in *Cullum Street*, in the City of *London*; and also two other freehold tenements; to hold to them the said *Robert* and *James Hill*, their executors and assigns, in trust, together with all his leasehold estates, money in the funds, and all other money and property, for the purposes thereafter named. He then directed his trustees to pay to his wife, *Susannah Yarrow*, the whole rents and profits of all his freehold houses and leasehold estates during her life, excepting his freehold estate at *Bedford*, which he directed to be sold for payment of his debts and legacies. And after some dispositions of No. 65 *Holy-*

*well Street*, and land at *Bethnal Green*, and a leasehold tenement at *New St. Mary Axe*, the testator gave to his son *George*, after the decease of his wife, his freehold tenement No. 163 *Holywell Street*, absolutely, subject to the payment of an annuity. He then continued: "I do give in trust to my executors and trustees for the sole benefit of my two daughters, *Elizabeth* and *Sarah Susannah*, my other three freehold houses, that is, my house No. 2 *Cullum Street* and my house No. 21 *Cullum Street*, in the City of *London*, and my freehold dwelling-house and garden, being No. 3 *John's Terrace, Hackney Road*, either to live in or let for their joint benefit, and my desire and will is, should either of my daughters die and leave no children or child lawfully begotten, then either one of these freehold houses, at the option of the surviving sister, shall be sold, and the money produced after such sale by auction shall be equally divided between the survivor and such of my sons as may be living, share and share alike; but in case either of my daughters should marry and have a child or children, then such child or children lawfully begotten shall have the mother's share of the rents and profits of the three houses after it or their mother's decease; and my will and desire is that the husbands of either of my said daughters shall have no control or benefit in the before-mentioned houses and estates whatsoever, and the rents and profits shall in no way be applicable to their wants, debts, or acts; and the receipts of my daughters or my executors only to be a discharge for rents, and their signatures only to any lease or leases or agreements for letting the same."

*Susannah Yarrow*, the widow of the testator, died on the 24th of June, 1845; *Sarah*, one of the daughters, died on the 3rd of April, 1852, without leaving issue; *Elizabeth Young*, the other daughter, died on the 30th of June, 1874, also without issue, having by her will, dated the 13th of May, 1873, given the residue of her property to *Charles Alfred Young*.

After the death of *Sarah Yarrow* one of the three freehold houses was sold and the proceeds distributed according to the directions in the will.

On the 27th of March, 1862, the surviving daughter, *Elizabeth Young*, granted a lease of one of the houses for twenty-one years to *William Still*, who was made a Defendant to the suit.

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Argument.  
—

The action came on to be heard before Vice-Chancellor *Malins* on the 12th of June, 1877.

*Glasse*, Q.C., and *Langley*, for *William Yarrow*, the heir-at-law of the testator, *William Smith Yarrow*:—

This is a gift by the testator of three freehold houses to trustees for the benefit of his two daughters, either to live in or to let for their joint benefit. That is a joint tenancy for life, and it was evidently the intention of the testator that if his daughters left issue the issue should succeed, but if both died without issue, then the property in the two unsold houses is undisposed of.

*Bristowe*, Q.C., and *Oswald*, for *Charles Alfred Young*, the devisee under the will of the surviving daughter:—

The estate given by the testator to his two daughters is commensurate with that given to the trustees, which is a fee, and there being no words of severance, they take as joint tenants. This view of the case is confirmed by the decision in *Moore v. Cleghorn* (1). There the devise was to trustees and their heirs “upon trust for the use and benefit” of *A.*, *B.*, and *C.*, or to the survivors or survivor of them, and it was held that *A.*, *B.*, and *C.* took equitable estates in fee as joint tenants. So in the case of *Challenger v. Sheppard* (2), it was held that where an estate in fee was given to trustees for *A. B.* without any limitation of the estate to the *cestuis que trust*, the latter took the beneficial interest in fee. There was a similar decision in *Bennett v. Bennett* (3) and *Toovey v. Bassett* (4). The first event contemplated by the testator is the death of one of the daughters without children, in which case he directs that one of the houses is to be sold. That event did happen, and the house was sold. The second event is the death of both daughters without issue, but in such a case there is no provision made for the estate to pass away from the daughter. As the event did not happen, the fee remained in the survivor, and her devisee is now entitled to the two houses.

[They referred to *Jarman* on Wills (5).]

(1) 10 Beav. 423.

(2) 8 T. R. 597.

(3) 2 Dr. & Sm. 266.

(4) 10 East, 460.

(5) 3rd Ed. vol. ii. p. 252.



*Higgins*, Q.C., and *Morris*, for *W. Still*, the lessee under the surviving daughter, cited *Gatenby v. Morgan* (1).

*J. Pearson*, Q.C., and *W. A. Clark*, for the trustee.

*Glasse*, in reply.

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MALINS, V.C.:—

This is a very peculiar will. The testator, being seised in fee of several freehold houses, gave and devised to his trustees all his five freehold houses and two freehold tenements to pay his wife the income for her life, and after her death to hold the property upon the trusts therein mentioned, and when he comes to the particular houses now in question the testator gives them in trust to his executors and trustees for the sole benefit of his two daughters, *Elizabeth* and *Sarah*, either to live in or let for their joint benefit. If the will had stopped there, as he had given the legal fee in the houses to trustees for the benefit of his daughters either to live in or let, I take it to be clear that whatever the estate was which the daughters took, they would have taken it as joint tenants. But what is the extent of the interest they take? In the absence of any special circumstances, where an estate is given in fee to trustees in trust for any persons, then the estate of the *cestui que trust* will be commensurate with the estate given to the trustees, and if the estate so given to the trustees is a legal estate in fee, the *cestui que trust* will take also in fee, and the estate would be a joint tenancy or tenancy in common, according to the words of the will. Here the testator gives the property in such a manner that the legal fee is in the trustees in trust for the benefit of his daughters. The settled rule always has been, that where an estate is given to *A.* and his heirs in trust for *B.*, then, the legal estate being given to the trustee, the *cestui que trust* will have an equitable estate commensurate with the legal estate.

That was laid down in *Challenger v. Sheppard* (2). The equitable interest is commensurate with the legal interest, and the legal interest being a fee, it follows that the equitable interest will also be a fee. That was followed by *Moore v. Cleghorn* (3). I

(1) 1 Q. B. D. 685.

(2) 8 T. R. 597.

(3) 10 Beav. 423.

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find in my copy of *Jarman* that I made a note many years ago opposite to the words "It is now settled that where lands are devised to trustees in fee in trust for a person without any words of limitation, the *cestui que trust* takes an equitable interest co-extensive with the legal estate of the trustees, *i.e.*, a fee : *Challenger v. Sheppard*." (1) The words I wrote were, "This point is now settled by *Moore v. Cleghorn*," (2) the case of *Moore v. Cleghorn* having been decided after my copy of *Jarman* was published. That case decided the broad principle that where a legal estate is given to trustees in trust for another, then, unless where there are special circumstances, the equitable estate will be commensurate with the legal estate. Then the case of *Knight v. Selby* (3) laid down the same principle.

Therefore, the legal estate being given to the trustees for the benefit of the two daughters, they necessarily take the fee, and, there being no words of severance, they take as joint tenants. If, as I have said, the words had stopped there, the two daughters would have become entitled to the whole of the property in fee.

Then it is said that it cannot be a joint tenancy, because part of the property is given over in another way. The words are these: "Should either of my daughters die and leave no children or child lawfully begotten, then either one of these freehold houses, at the option of the surviving sister, shall be sold, and the money produced after such sale by auction shall be equally divided between the survivor and such of my sons as may be living, share and share alike." Now what is the consequence of saying that if a particular event happens, that is, if one of my daughters die and leave no child or children, then a part of the property is to be taken out and sold? Why should that interfere with the joint tenancy of the remaining two houses which the daughters took? All the three houses were devised generally. The testator in a particular event takes one of them out; that particular event happened, and one house is taken out of the limitation and disposed of in another way. Suppose a testator gives property to a particular person and adds this proviso, but if *John Smith* returns from abroad, then he is to have a portion of the property. That would

(1) 8 T. R. 597.

(2) 10 Beav. 423.

(3) 3 Man. & G. 92.

be precisely similar to this clause. One house is taken out of the limitation to the daughters in a particular event, and as that event did happen, that house is excluded from the devise.

Then the testator proceeds, "But in case either of my daughters should marry and have a child or children"—that is another event which, in fact, never did occur, that is, the death of either of his daughters leaving a child or children—such child or children are to have the mother's share. So as to that event the limitation is left untouched.

Now, irrespective of that altogether, there is a further reason why the two daughters should take in fee simple. In the well-known cases of *Frogmorton v. Holyday* (1) and *Doe v. Cundall* (2), followed by *Toovey v. Bassett* (3), it was decided that where property under the old law is given to A., and if he shall happen to die under twenty-one, then the property is to go over, that gives an estate in fee to the first taker, because if he is to lose it only in the event of dying under twenty-one, it is only in one case that he is to lose it, and he is otherwise to have the entire property. If the event happen, it will go over; if not, it will remain.

Suppose I give all my lands to my daughter. That of itself was by the old cases a mere gift for life, because there are no words of inheritance; but if I say that in case she leaves no child the estate is to go over, then it is to go over in that event only, and if the event does not happen, then she retains it for ever. In this case the words are, "but in case either of my daughters should marry and have a child or children, then such child or children shall have the mother's share." So she is only to part with the property in the event of her leaving children.

Therefore, on the two grounds, first, that there is an equitable estate in the daughters commensurate with the legal estate in the trustees, and there are no words to alter the effect of the rule which I have stated; and, secondly, that the property is only to go over in case of an event happening which never did happen, I think the daughters took the estate jointly in fee. There must, therefore, be a declaration that under the will of *William Smith*

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(1) 3 Burr. 1618.

(2) 9 East, 400.

(3) 10 East, 460.

C. A. *Yarrow, W. Yarrow* had no interest in the estate, and that the  
 1878 estate vested in his two daughters as equitable tenants in fee, and  
 YARROW Mrs. *Yarrow*, as the survivor, became entitled to the whole of the  
 v. property.  
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C. A. Some parties entitled in the event of intestacy, who had obtained  
 leave to attend the proceedings, appealed. The appeal was heard  
 on the 9th of May, 1878.

Argument. *Higgins, Q.C., and Daunev, for the Appellants:—*

We contend that the Vice-Chancellor took an erroneous view of  
 the effect of *Moore v. Cleghorn* (1) and *Challenger v. Sheppard* (2).  
 We do not dispute that a simple gift to *A.* and his heirs in trust  
 for *B.* gives *B.* an equitable fee, but the difference between those  
 cases and the present is shewn by *Re Pollard's Estate* (3). The  
 fee cannot be thus given to persons where there are limitations  
 over after their deaths.

*Cozens-Hardy*, for a party in the same interest.

*Glasse, Q.C., and Langley*, for the Plaintiff.

*J. Pearson, Q.C., and Hadley*, for the trustee.

*Bristowe, Q.C., Everitt, and Maidlow*, for *Young*, in support of  
 the order, were not called upon.

Judgment, C. A. JAMES, L.J.:—  
 James, L.J.

I am of opinion that the decision of the Vice-Chancellor must  
 be affirmed. It is of no use to ask what the testator actually in-  
 tended in the events which have happened; he probably had not  
 an idea on the subject. We can only construe his will by taking  
 the words he has used, and applying the general rules of construc-  
 tion. Before the *Wills Act* words of inheritance were generally  
 necessary to pass the fee in freehold estates, but one of the excep-  
 tions was, that if, either by words of inheritance or by other words,  
 a fee was given to trustees, a declaration of trust without words of  
 inheritance would pass the equitable fee to the beneficiaries. A

(1) 10 Beav. 423.

(2) 8 T. R. 597.

(3) 3 D. J. & S. 541.



doubt might well have been entertained in the case of a devise in fee to trustees upon trust for *A.* for his life, and after his death for his children; but it has been decided that the children take a fee, and there is no reason to disturb that decision. Here there is no doubt that the trustees take a fee, and the words “for the sole use and benefit of my daughters either to live in or let,” would, if the will had stopped there, have given the daughters an equitable fee. Then, as the Vice-Chancellor asked, is there anything to cut down this fee? The testator makes particular limitations, which in certain events defeat the original gift, but they appear to me to be only executory limitations, which, so far as they do not take effect, leave the original gift unaffected.

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BAGGALLAY, L.J. :—

Baggallay, L.J.

If the will had ended with the words “either to live in or let for their joint benefit,” the daughters would, according to the authorities, have taken an equitable fee. Then the testator mentions two cases, in each of which he intends that gift in fee to be modified for the benefit of other persons. First, if one of the daughters dies without leaving a child, in which case one of the houses is to be sold and the proceeds divided in a particular way; and, secondly, in the case of a daughter dying leaving children the children are to take her share after her death. So far as these limitations do not take effect, the original joint beneficial gift in fee remains undisturbed.

BRAMWELL, L.J. :—

Bramwell, L.J.

I also am of opinion that the decision of the Vice-Chancellor must be affirmed.

Solicitors : *E. W. Parkes ; J. Haines ; Tippetts & Co. ; A. S. Ramskill ; W. T. Reeve.*

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V.-C. B.

Jan. 18.

C. A.

May 10.

## JOHNS v. JAMES.

[1877 J. 98.]

*Trust Deed for Creditors—Communication to Creditors.*

A man conveyed all his property to the Defendants upon trust to pay thereout a sum of £5000 which they were to raise on his behalf, and all other debts due from the assignor, including a debt due to the Plaintiff. The Defendants realized the property of the assignor, and alleged that they had paid some of the debts out of the proceeds. The Plaintiff brought an action against the Defendants asking for an account of the property, and that the debts of the Plaintiff and the other creditors might be satisfied thereout. The statement of claim contained no allegation that the assignment had been communicated to the Plaintiff. The Defendants demurred:—

*Held* (reversing the decision of *Bacon*, V.C.), that the Defendants were not trustees for the Plaintiff, and that the demurrer must be allowed.

*Garrard v. Lord Lauderdale* (1) and *Acton v. Woodgate* (2) followed.

Statement.

**DEMURRER** to an action by a creditor against the trustees of certain deeds of assignment for the benefit of creditors.

The statement of claim contained the following allegations:—

In the month of June, 1871, *William Meyrick*, who had been previously in partnership with the Defendants, *J. James* and another, as solicitors, was indebted to the Plaintiff in a sum of £3500, for which sum *Meyrick* was personally liable, and his firm was also collectively liable to him for the same sum.

*Meyrick* being in pecuniary difficulties agreed that the Defendants should borrow £5000 for the payment of his debts, or some of them. The repayment of this sum to the Defendants was secured by a mortgage by *Meyrick* to them of certain leasehold premises and other property, dated the 22nd of June, 1871.

By another indenture of the same date *Meyrick* appointed the Defendants his attorneys for the purpose of winding up the partnership and to get in all debts due to him, and all his goods, chattels, and effects, and to stand possessed of the moneys to be received and got in in trust to pay the debts due from *Meyrick*, including the Plaintiff's said debt; and by a deed dated the 23rd of June, 1871, *Meyrick* assigned to the Defendants certain policies of assurance and other property for the like purpose.

(1) 2 Russ. & My. 451.

(2) 2 My. & K. 492.

*SC as with 13 Ch D. 370*

By two other indentures dated the 1st of November, 1871, *Meyrick* assigned all his share in the partnership to the Defendants upon trust to pay thereout the aforesaid sum of £5000, and also all other debts due from him, including the Plaintiff's said debt.

In May, 1874, *Meyrick* became bankrupt. The Defendants, acting or purporting to act under or by virtue of the said several deeds, obtained possession of the entire estate and effects of *Meyrick*, from which they had received large sums of money, and they alleged that they had expended the whole of such moneys in payment of some of the debts of *Meyrick*, but had not paid the Plaintiff any part of his said debt, and had never rendered him any accounts shewing their dealings with the said estate and effects.

The Plaintiff had seen some accounts purporting to be a partial account of the dealings of the Defendants with the trust property and effects, which, if correct, shewed that the Defendants had not fairly and properly described *Meyrick's* debts.

The Plaintiff claimed that an account should be taken of *Meyrick's* estate and effects, and of the Defendants' dealings therewith; and that the estate and effects might be administered by the Court, and the debts of the Plaintiff and of other creditors satisfied thereout. The Plaintiffs demurred generally to this statement of claim; they also denied several of the allegations contained in it.

The demurrer was heard before Vice-Chancellor *Bacon* on the 18th of January, 1878.

*Hemming*, Q.C., and *Romer*, in support of the demurrer.

Sir *H. Jackson*, Q.C., and *Cottrell*, for the Plaintiff.

*Hemming*, in reply.

BACON, V.C. :—

The whole substance of Mr. *Hemming's* argument comes to this—that under these deeds the Plaintiff has no right to maintain this suit, because he has not said in his pleadings that they were communicated to him; and that is the sole point to be decided.

Now, the law upon the subject has been very plainly stated. Where an assignment has been made for the benefit of creditors,

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unless there has been communication, the maker of the deed and the grantee have power over the deed, and can revoke it whenever they think fit. But if the trustee be himself a creditor, or if there has been a communication of the deed to a creditor, or to any number of creditors, where the transaction is between a debtor and some of his creditors for the benefit of all, how can it be said that the deed is revocable, at least without the consent of the trustee named in it?

All that doctrine about the trustee being a mandatory, holding money to be applied for the benefit of the particular persons named, unless the debtor directs some other application of it, has nothing to do with the case before me.

In this case, the debtor, *Meyrick*, was indebted to three persons, the Defendants being two of them, and the Plaintiff being the third. The Defendants and *Meyrick* came to an arrangement between themselves that the property of *Meyrick* should be applied to the payment of *Meyrick's* debts, including the debt owing to the Plaintiff, and the deeds were executed on that footing. It is confessed that the origin of the transaction was, that the Defendants should take their security upon trust to pay all the debts; and that the deed was executed, and the subject-matter of it taken possession of, apportioned, and applied by them, in execution of the trusts. No suggestion has been made that it was in the power of the Defendants to revoke the deed without the consent of the Plaintiff, the remaining creditor. If it should be held to be in the power of the trustees to communicate the contents of such a deed as this to two or three of the creditors, and to divide the property between themselves and these two or three creditors, to the exclusion of the rest, that would be creating other trusts than those which are declared by this deed.

Admitting all that has been argued respecting the necessity of communication of such a deed as this, more has been done here than mere communication, for here there has been, as the Defendants admit, a part execution of the trusts. There has been, as the Defendants admit, no revocation. The trusts are subsisting trusts, which the Plaintiff has, in my opinion, upon all the facts which have been stated, a perfect right to insist upon execution in this Court.



The case of *Siggers v. Evans* (1), before Lord Campbell, went very fully into the various questions which have been adjudicated upon in this Court, and established this very plain distinction. A debtor, having an execution threatened, made an assignment to one of his creditors upon trust for the others, and that assignment was held to prevail against the execution creditor. It was established beyond all question that the deed was irrevocable, so far as the maker was concerned, without the assent of the trustee, he being himself a creditor. If it could have been rescinded, it could only have been with the joint assent of all the creditors, including the trustee.

In my opinion the demurrer must be overruled.

From this decision the Defendants appealed. The appeal was heard on the 10th of May, 1878.

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*Hemming*, Q.C., and *Romey*, for the Defendants, in support of the demurrer:—

Argument.

The Plaintiff is not entitled to sue in this Court. He is not a *cestui que trust* under the deed, nor in such a position as to be entitled to the assistance of the Court. When a deed is executed by a debtor whereby property is vested in trustees for the purpose of paying the debts, no creditor is a *cestui que trust* entitled to sue except a creditor to whom the fact of the execution of the deed has been communicated, and who has acted upon that knowledge. Where the trustee is a creditor there is a trust, but it is for him alone and not for the other creditors who have received no communication. This claim does not state that the fact of the execution of the deed was communicated to the Plaintiff, and hence is defective and demurrable. In *Acton v. Woodgate* (2) the trustee was a creditor, as here, and yet it was held that the other creditors were not *cestuis que trust*.

[They also cited *Walwyn v. Coutts* (3); *Garrard v. Lord Lauderdale* (4); *Gibbs v. Glamis* (5); *Mackinnon v. Stewart* (6); *Glegg*

(1) 5 E. &amp; B. 367.

(2) 2 My. &amp; K. 492.

(3) 3 Mer. 707.

(4) 3 Sim. 1; 2 Russ. &amp; My. 451.

(5) 11 Sim. 584.

(6) 1 Sim. (N.S.) 76.

C. A. v. *Rees* (1); *Wilding v. Richards* (2); *Griffith v. Ricketts* (3); *Smith v. Hurst* (4); *Ex parte Pye* (5).

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Argument.  
—

Sir *H. Jackson*, Q.C., and *Cottrell*, for the Plaintiff:—

Without disputing any of the authorities cited, although *Garrard v. Lord Lauderdale* (6) appears not to have been approved by Vice-Chancellor *Knight Bruce* in *Wilding v. Richards*, the rule is, that where a trust, created in favour of volunteers, has been executed, the Court will fasten a trust on the conscience of the trustee, and decree its execution. This it will do by force of the statute of *Elizabeth*; the rule being, that whenever a debtor has assigned property to an assignee for the benefit of creditors, when any creditor has had notice, or whenever the deed has been in fact executed to any extent, all the creditors are *cestuis que trust*, and may have execution of the trusts decreed by the Court. The claim, though it does not aver communication to the Plaintiff, yet does aver that the deed has been executed to the exclusion of the Plaintiff, and thus it avers knowledge of the fact of the execution: *Ellison v. Ellison* (7); *Nicholson v. Tutin* (8); *Raworth v. Parker* (9); *Siggers v. Evans* (10); *Hobson v. Thellusson* (11); *Harland v. Binks* (12); *Kirwan v. Daniel* (13); *Cosser v. Radford* (14).

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James, L.J.  
—

I am of opinion that the decision of the Vice-Chancellor in this case ought not to be affirmed, and that the demurrer ought to have been allowed.

It appears to me to be too late now to question the principle of *Garrard v. Lord Lauderdale*; it is too late now to repeat the doubts which were expressed by Vice-Chancellor *Knight Bruce* as

(1) Law Rep. 7 Ch. 71.

(2) 1 Coll. 655.

(3) 7 Hare, 299.

(4) 10 Hare, 30.

(5) 18 Ves. 140.

(6) 2 Russ. & My. 451.

(7) 1 W. & T. 5th Ed. 273.

(8) 2 K. & J. 18.

(9) Ibid. 163.

(10) 5 E. & B. 367.

(11) Law Rep. 2 Q. B. 642.

(12) 15 Q. B. 713.

(13) 5 Hare, 493.

(14) 1 D. J. & S. 585.

to the original propriety of the decision, and which, I must confess, I am not disposed to share.

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*Garrard v. Lord Lauderdale* (1) seems to me to have proceeded upon the plainest notions of common sense. It is quite obvious that a man in pecuniary difficulties, having a great number of debts which he could not meet, might put his property in the hands of certain persons to realize and pay the creditors in the best way they could. It was held by the Vice-Chancellor, and it has been affirmed, that really after all that is only making those particular persons who are called trustees his agents or attorneys. There might be a power of attorney from him to realize all his property, and relieve him from the difficulties he was in. If it were supposed that such a deed as that created an absolute irrevocable trust in favour of every one of the persons who happened at the time to be a creditor, the result might have been very often monstrous. It would give him no opportunity of paying a creditor who was pressing; no opportunity of settling an action; no opportunity of getting any food for himself or his family the next day, or redeeming property pledged. So, where there was an actual conveyance on trust, it was held in *Walwyn v. Coutts* (2), that where it was for all the creditors it must be assumed from the very nature of the transaction, and from the position of the assignor, that it was a thing for his own benefit, and not for the benefit of numbers of persons whom the trustees would probably have no means of ascertaining, and whose debts the trustees would probably have no means of knowing. If you once assumed that this was an absolute trust in favour of every creditor, every person who had a right to claim to be a creditor, or had some demand against him, every one of those might have filed a bill, and the unfortunate trustee under those circumstances (who might have acted the part of a friend to the impecunious person) might have been liable to a thousand bills in Chancery, for he could not stop any of them till a decree was made in favour of all the creditors.

Those are some of the reasons that appear to me to have led the Court to say that such a deed as this is to be construed as a mandate, the same sort of mandate that a man gives when he gives his servant money, with directions to pay it in a particular

(1) 3 Sim. 1; 2 Russ. &amp; My. 451.

(2) 3 Mer. 707.

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way ; it does not create any equitable or legal right in favour of a particular creditor. The right to the direction of the money is the right of the person who has put the money in the hands of his agent or steward or whoever he may be. *Walwyn v. Coutts* (1) laid that down as the law where the deed was for creditors generally. *Garrard v. Lord Lauderdale* (2) only extended it to the case where the names of the creditors were scheduled, and the amounts due were scheduled, and that was held not to make any difference ; and from that time to this I believe that has been the doctrine of the Court. The deed itself does not create a trust in favour of all and every or any of the creditors. But circumstances may have occurred, circumstances may have existed which did make the assignment a trust or an obligation in favour of some particular person. If the creditor has executed the deed himself, and been a party to it, and assented to it—if he has entered into obligations upon the faith of the deed, of course that gives him a right, just as in the case where a man receives money from a person, or a direction from his creditor to pay some other person instead of paying him, and he communicates it to this person. The person to whom he communicates it of course has a legal right to have the money so applied, but that does not enure for the benefit of any other person or persons to whom no such communication has been made. It seems to me that on principle you cannot create a right in *A.* where the deed has not given him a right, because something has occurred giving *B.* a right, who originally was in the same position as *A.* That was, in fact, the principle of the decision in *Acton v. Woodgate* (3) ; for in that case, there being beyond all question a trust deed in favour of all the creditors, including certain *post-obit* creditors, whom the settlor was afterwards minded not to put on the same footing as his other creditors, the settlor directed that they should be excluded from the benefit of the deed ; and it was held by the Court that it was perfectly in his power to do so, and the deed remained still as a deed to be executed in favour of all the creditors except the *post-obit* creditors, and they were not *cestuis que trust* by the deed. It was called a partial revocation by Sir *Henry Jackson*. It is not a

(1) 3 Mer. 707.

(2) 2 Russ. &amp; My. 451.

(3) 2 My. &amp; K. 492.



case of revocation in one sense; you cannot revoke the deed, and cannot get the property out of the hands of the trustee until, at all events, you have satisfied all the charges and expenses he has incurred, and any right he has acquired in the property. It is not a revocation of the deed, but it is a revocation of the directions given by the deed to the assignor's agent as to what he shall do with the proceeds. It appears to me that this is clearly a case of the same kind as *Wallwyn v. Coutts* (1) and *Garrard v. Lord Lauderdale* (2), viz., the case of a creditor to whom no communication has been made, who has never been induced to act by anything that occurred by reason of the execution of this deed. I think there is no case which has been cited which in the slightest degree shakes the authority of *Garrard v. Lord Lauderdale*, as explained and acted upon in *Acton v. Woodgate* (3).

The authority upon which the Vice-Chancellor seems to have proceeded was the judgment of Lord *Campbell*, in the Court of Queen's Bench, in *Siggers v. Evans* (4); and there, when the case comes to be examined, and we see exactly what the point was and how it arose, it really has in my view no bearing whatever upon this question; because it was simply a question whether, where the trustee to whom the property was conveyed, and in whom the legal right to the property was vested was himself a *cestui que trust* or a person interested in the deed, an execution creditor was entitled under those circumstances to say that the whole thing was void as being a violation of the statute 13 Eliz., that there was no property conveyed to the trustee at all, and that therefore the execution creditor could take the property. That was the point raised there and the sole point determined, and I may say rightly determined, upon the principles laid down, which really have nothing to do with this case.

The other case, which seemed at first something like this case, was the case of *Cosser v. Radford* (5), but there there was a simple contract creditor who was allowed to sustain the bill. At first I thought it was on behalf of himself and all other the simple contract creditors, but it was expressly on behalf of himself and

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(1) 3 Mer. 707.

(3) 2 My. &amp; K. 492.

(2) 2 Russ. &amp; My. 451.

(4) 5 E. &amp; B. 567.

(5) 1 D. J. &amp; S. 585.

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all other the creditors entitled to the benefit of the deed, and it so happened that he himself had executed the deed, and other simple contract creditors had executed the deed, and he had himself been communicated with and had received part payment in execution of the deed. Therefore, it was held that he and those persons who were in the same position as himself had entitled themselves to the benefit of the trust, and the sole thing determined there was that there was nothing in the subsequent clauses of the deed which deprived the plaintiff of the equity which he would have had but for those subsequent clauses.

I am of opinion that it is not desirable to draw nice distinctions between cases, and to say that *Garrard v. Lord Lauderdale* (1) is good law, and only good law for the exact facts. It appears to me to be based upon very good common sense, and it is desirable that those cases that are substantially the same as *Garrard v. Lord Lauderdale* should receive the same decision. It is desirable that the law should be uniform, and that people should not be tempted to bring experimental new suits on minute differences of fact.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion, and I am unable to distinguish this case (if we have regard only to those facts which we can properly regard) from that of *Garrard v. Lord Lauderdale*. The statement of claim sets forth a variety of deeds executed in the months of June and November 1871, and the property was transferred for the purpose of being applied in payment of the debts of *Meyrick*, including the debt of the Plaintiff. The Plaintiff then commenced this action for the purpose of having the property included in those several deeds applied for the benefit of the creditors according to the terms of those deeds. Now, stating the case so far is really stating facts which exactly agree with those in *Garrard v. Lord Lauderdale*. In the absence of any allegation upon the face of the statement of claim that the provisions of those deeds were acted upon or communicated to the various creditors or any creditors of *Meyrick*, it appears to me that there is no distinction whatever which can be drawn between the facts of this case and that of *Garrard v. Lord Lauderdale*.

(1) 2 Russ. & My. 451.

This being by way of demurrer, we are bound by the statements which are to be found in the claim, and I am unable to find any statement whatever to the effect that those deeds, or any of them, were communicated to any of the creditors of *Meyrick*; and of course, if not communicated they were not acted upon.

It has been suggested that one of the trustees—I call him a trustee because that term has been applied to him throughout the whole of the proceedings—one of the Defendants would be perhaps the correct expression—was himself a creditor. I am unable to find any allegation on the face of this statement of claim to that effect. Then, if the facts which we can properly take into consideration are not distinguishable from those in *Garrard v. Lord Lauderdale* (1), how can we come to any other decision in the case than such a decision as that which was arrived at in that case? I entirely agree with the observation which fell from Lord Justice *James* as to the principle involved in *Garrard v. Lord Lauderdale*; and though, no doubt, some observations were made in 1845 by Vice-Chancellor *Knight Bruce*, and in 1849 by Vice-Chancellor *Wigram*, indicating disapproval of that case, thirty years have elapsed since the last of those *dicta* was pronounced; and *Walwyn v. Coutts* (2), *Garrard v. Lord Lauderdale*, and *Acton v. Woodgate* (3) have ever since been recognised and acted upon, and they were distinctly recognised and spoken of with approbation in the House of Lords by the Lord Chancellor and Lord *Cranworth*, in the year 1858, in the case of *Montifiori v. Browne* (4).

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BRAMWELL, L.J.:—

Bramwell, L.J.

I am of the same opinion. I agree with the reasons which were given by the Lords Justices; and the only observation I shall make in addition is, that I cannot think that the case of *Siggers v. Evans* (5) calls for the conclusion that the learned Vice-Chancellor has come to. It seems to me that the case merely decided this—that the deed was not a void or voidable one, that is to say, one which the grantor could nullify by proceedings on the ground

(1) 2 Russ. &amp; My. 451.

(3) 2 My. &amp; K. 492.

(2) 3 Mer. 707.

(4) 7 H. L. C. 241.

(5) 5 E. &amp; B. 567.

C. A. that no interest had been given. That is all that that case  
 1878 decided, to my mind, and decided rightly enough, because it is  
 ~~~~~ manifest that *Siggers*, the grantee in that deed, had an interest  
 JOHNS given to him which he could have enforced until he had been
 v. satisfied in respect of it; and till then at least it would have been
 JAMES, impossible for the grantor to have got rid of the deed or the trusts
 ~~~~~ or obligations contained in it. Consequently that case is no autho-  
 Judgment, C. A. rity for the decision of the learned Vice-Chancellor. The demurrer  
 Bramwell, L.J. must be allowed.

On the application of the counsel for the Plaintiff leave was  
 given to amend the statement of claim.

Solicitor for Plaintiff: *G. B. Norman*.

Solicitor for Defendant: *C. F. Millett*.

Overruled. MAC-  
 DONALD v. GREEN  
 [1951] 1 K. B. 594

Per DENNING, L.J.: "No longer  
 good law." MACDONALD v. GREEN.  
 [1950] 2 All E.R. 1240.

C. A.

*Ex parte* PYKE. *In re* LISTER.

1878

*Proof—Gaming Debt—Illegal Consideration—Money lent to pay a lost Bet—*  
 5 & 6 Will. 4, c. 41, s. 1.

May 16.

Money lent to enable the borrower to pay a bet which he has already lost  
 does not constitute a debt for an "illegal consideration" within the Act  
 5 & 6 Will. 4, c. 41.

Consequently, such a debt can be proved in the bankruptcy of the bor-  
 rower.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*,  
 acting as Chief Judge in Bankruptcy.

In 1876 *Thomas Lister* employed *John Barratt* as his agent to  
 back some horses which were to run in various races. *Barratt*  
 made the bets, and the horses lost the races. *Lister* then applied  
 to *Barratt* to advance him the money to pay the bets to the  
 winners, and to pay them for him, and *Barratt* paid the bets accord-  
 ingly in the settlement at *Tattersall's*. *Lister* gave *Barratt* two  
 promissory notes for £650 each, which represented the greater  
 part of what *Barratt* had paid for him. The promissory notes  
 were not paid, and *Lister* was adjudicated a bankrupt.

*Barratt* tendered a proof in the bankruptcy for £1328, which

15 CLD 485  
 100 QBD 105-6



sum he deposed that *Lister* owed him "for money lent by me to him, and also for money paid by me for his use at his request," and stated that he had received no satisfaction or security for the debt except the two promissory notes. The trustee rejected the proof, on the ground that there was no consideration for the promissory notes, and that the transactions for which they were alleged to have been given were illegal. The Registrar ordered the proof to be admitted. The trustee appealed.

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*Ex parte*  
PYKE.*In re*  
LISTER.

*L. E. Pyke*, for the Appellant:—

*Argument.*

This is a debt for an "illegal consideration" within the meaning of the Act 5 & 6 Will. 4, c. 41 (1), and therefore the proof cannot be admitted. The promissory notes were given to secure a gaming debt. Horse-racing is a game within the statute of *Anne*: *Blaxton v. Pye* (2); *Applegarth v. Colley* (3). The latter case also shews that the effect of 5 & 6 Will. 4, c. 41, is to make, not only the security, but the contract itself, illegal.

[*Winslow*, Q.C., referred to *Bubb v. Yelverton* (4); *Oulds v. Harrison* (5).]

The Act 5 & 6 Will. 4, c. 41, was not cited in *Oulds v. Har-*

(1) The Act 5 & 6 Will. 4, c. 41, contains a recital of the Act 9 Anne, c. 14, whereby it was enacted that "all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given, granted, drawn, or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as did game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of

such play to any person or persons so gaming or betting as aforesaid, or that should, during such play, so play or bet, should be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever," and repeals so much of that Act "as enacts that any note, bill, or mortgage shall be absolutely void," and enacts instead that "Every note, bill, or mortgage, which, if this Act had not been passed, would," by virtue of the recited Act, "have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration."

(2) 2 Wils. 309.

(3) 10 M. &amp; W. 723.

(4) Law Rep. 9 Eq. 471.

(5) 10 Ex. 572.

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Argument.

*rison* (1), and the decision was upon a plea framed with reference to the Act 8 & 9 Vict. c. 109. In the present case the money was lent for the purpose of betting, and the Act of Will. 4 clearly applies.

[JESSEL, M.R.:—The money was not lent to enable the bankrupt to make a bet; it was lent to enable him to pay a bet which he had already made and lost.]

*Hay v. Ayling* (2) applies.

[BRAMWELL, L.J.:—There a bill of exchange was accepted for a lost bet, not for money lent by some one else to pay it.]

But that case shews that the Act applies after the bet has been made and lost. *Hill v. Fox* (3) is in point.

[JESSEL, M.R.:—The question left to the jury there was, whether there had been a colourable evasion of the statute.]

The authority given to make the bet did not include an authority to pay it when lost. Excessive gaming was illegal at common law: *Rex v. Rogier* (4). At any rate, the principle of *Higginson v. Simpson* (5) applies.

*Winslow*, Q.C., and *Yate Lee*, for *Barratt*, were not heard.

Judgment,  
Jessel, M.R.

JESSEL, M.R.:—

I am of opinion that the appeal must fail. We must see what the meaning of the Act really is. The facts are few and simple. *Lister* employed *Barratt* as his agent to back some horses which were to run in some races. The horses lost the races, and consequently *Lister* became liable as a debt of honour to pay the winners of the bets. He requested *Barratt* to lend him the money to pay the bets. *Barratt* did so, and paid the bets, and for part of the money which he thus advanced he took promissory notes from *Lister*. *Lister* became bankrupt, and *Barratt* claimed to prove, and has been allowed by the Registrar to prove, in the bankruptcy, not upon the notes, but for money lent to *Lister* and paid for his use at his request. There could be no answer to such

(1) 10 Ex. 572.

(2) 16 Q. B. 423.

(3) 4 H. & N. 359.

(4) 1 B. & C. 272.

(5) 2 C. P. D. 76.

a claim, unless the debt thus arising is made void by some statute. It is said that the Act 5 & 6 Will. 4, c. 41, has that effect. The question, therefore, is whether the money thus lent by *Barratt* was "knowingly lent or advanced for gaming or betting." In my opinion it was not. When you look at the Act it is clear that what it means is money lent to carry out the illegal purpose of gaming or betting. If a number of men are round a gaming table, and one of them asks another to lend him money to game with, and he lends the money, that is money "lent for gaming" within the meaning of the Act. And so also, if money is lent to a man to enable him to make a bet, that is money "lent for betting." That this is what the Act really contemplates, is shewn by the words which immediately follow, "lent or advanced at the time and place of such play to any person or persons so gaming or betting." The object of the Act was to prevent gaming or betting from taking place, to deter people from committing the illegal act. But in the present case the mischief had been completed, the illegal act had been carried out, before the money was lent. The money was advanced to enable the borrower to pay the bets which he had already made and lost, which seems to me an entirely different thing from a loan of money to enable a man to make a bet. In the case of *Alcinbrook v. Hall* (1), which was an "action upon an *assumpsit*, for money paid by the Plaintiff for the Defendant at his instance and request. The Defendant having lost a sum of money above £10, upon a bet at a horse-race, requested the Plaintiff to pay it for him, which he did. The Defendant objected that, this money being lost at gaming, and recoverable back again by the statute 9 Anne, c. 14, this action would not lie. But the Court held that this was not a case within the statute, for there is not the word contract as in the *Statute of Usury*: *Barjeau v. Walmsley* (2). So the Court here held this was not a case within the statute 9 Anne, and gave judgment for the Plaintiff." That was certainly a very strict construction of the Act, but it must be remembered that it is a penal Act. That case is directly in point, and I can see no reason why we should attempt to overrule it. I think, therefore, that the Registrar's decision is right, and ought to be affirmed.

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*Ex parte*

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Judgment,  
Jessel, M.R.10QB D  
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(1) 2 Wils. 309.

(2) Str. 1248.

C. A. JAMES, L.J. :—

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*Ex parte*  
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 LISTER.  
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I am of the same opinion. This very point has to my knowledge been decided before by this Court, with reference both to bets on horse-races and to contracts for the payments of differences on the *Stock Exchange*, though I cannot undertake to say that this Act of 5 & 6 Will. 4 was referred to on those occasions.

Bramwell, L.J. BRAMWELL, L.J. :—

I am of the same opinion, and I have nothing to add.

Appeal dismissed with costs.

Solicitors for Appellant: *Pyke & Minchin*.

Solicitor for Respondent: *C. J. Mander*, agent for *Hunter & Curtis, Leicester*.

## HOMER v. HOMER.

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FRY, J.  
 May 11.

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Feb. 26;  
 March 1;  
 May 23.

[1875 H. 248.]

*Will—Construction—Misdescription—Words “at or within”—Devise of all Testator’s Lands “situate at or within D.”—Contiguous Land not within D.—Devise of all Testator’s Lands “situate at G., in the Occupation of S.”—Land at G. in the Occupation of J.—Falsa Demonstratio—Argument ab inconvenienti—Suit before Judicature Act—Construction of Legal Devises—Order to proceed under new Practice.*

A testator devised all his lands “situated at or within *D.*, in the occupation of *J.*” The testator was seised of two farms, both in the occupation of *J.* The greater part of each of the farms was within the parish of *D.*, but three closes of one and one close of the other were respectively situate in an adjoining parish. In each case the portion which was not in the parish of *D.* immediately adjoined the remainder of the farm, and was only separated from it by the parish boundary, which was, in the one case, a high road, and in the other, a fence. In the latter case the parish church of *D.* was only a few yards distant from the fence :—

*Held*, reversing the decision of *Fry, J.*, that the devise comprised the four closes adjoining the parish of *D.*

The testator also devised all his land “situate at *G.*, in the occupation of *S.*” :—

*Held* (affirming the decision of *Fry, J.*), that this devise did not include land situate at *G.*, but in the occupation of *J.*



Observations on the use of the argument *ab inconvenienti* in the construction of wills.

A suit having been instituted just before the *Judicature Act* came into operation, to ascertain the construction of legal devises, an order was made at the trial that the cause should proceed under the new practice.

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Statement.

*RICHARD HOMER*, by his will, dated the 11th of June, 1847, devised his freehold estate called *Bromley Hall*, and his other freehold estate late *Peskalls*, in the parish of *Kingswinford*, and also all his copyhold hereditaments situate at *Sedgley*, and also all his manor of *Dormstone*, and all his messuages, tenements, lands, and hereditaments, situate at or within *Dormstone* aforesaid, and at *Stock Green*, in the parish of *Fladbury*, and then in the several occupations of *Josiah Green* and — *Summers* and *John Ganderton*, and also his estate called the *High Barns*, and also all his estate in the parish of *Kingsnorton*, unto and to the use of his only child *Charles Kemp Homer* and his assigns during his life; and from and after his decease the testator gave and devised all that his said manor of *Dormstone*, and all his messuages, tenements, and lands situated at or within *Dormstone* aforesaid, then in the occupation of the said *Josiah Green*, and all his lands situated at *Stock Green* aforesaid, then or late in the occupation of — *Summers*, to the uses and upon the trusts therein mentioned, under which the Plaintiff, *Elizabeth Anne Homer*, a great-granddaughter of the testator, was, at the date of the filing of the bill, entitled as legal tenant in tail in possession. And from and after the decease of his son *C. K. Homer* the testator devised his estate called *High Barns* and his copyhold hereditaments at *Sedgley* respectively to and upon certain other uses and trusts. And from and after the decease of his said son *C. K. Homer* he gave and devised all that his “messuage, tenement, and estate situate at or within *Dormstone* aforesaid, with the several lands, hereditaments, and appurtenances thereunto belonging, called the *Quarry Farm*, then in the occupation of the said *John Ganderton*,” to and upon certain other uses and trusts therein declared. And the testator devised his estate called *Bromley Hall*, and his estate late *Peskalls* (subject to the life estate of *C. K. Homer*), and all other his freehold estates in the parish of *Kingswinford* not thereinbefore devised, and all his hereditaments situate in the parish of *Dudley*, and all his

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undivided one-third part of and in certain other specified estates in the parish of *Kingswinford*, and his leasehold messuage called *Pedmore Hall*, and all other the real estates whatsoever and wheresoever, and also all other the leasehold estates whatsoever and wheresoever of or to which he should be seised or possessed or entitled at the time of his decease not thereinbefore otherwise disposed of, to trustees, upon trust for sale and investment of the proceeds upon certain trusts in the will declared.

The testator died on the 11th of June, 1847.

The testator at the time of his decease was possessed of the manor of *Dormstone*, in the county of *Worcester*, and also of three freehold farms situate wholly or in part within the limits of the parish of *Dormstone*, viz., (a) a farm called the *Bag End Farm*, in the occupation of *Josiah Green*. This farm consisted of a farm-house and sixteen closes of land. The farm-house and fifteen of the closes were within the parish of *Dormstone*, and the other close was situate in the adjoining parish of *Inkberrow*, but adjacent to one of the fifteen closes, and separated from it by a hedge only. (b) A farm called the *Manor Farm*, also in the occupation of *Josiah Green*. This farm consisted of a farm-house and eleven closes of land. The farm-house and eight of the closes were within the parish of *Dormstone*, and the other three closes were situate in the adjoining parish of *Kington*. The high road leading from *Kington* towards *Stock Green* was the boundary line between the two parishes of *Dormstone* and *Kington*; and two of the three closes abutted on the high road, and were separated by it from the other portion of the farm, and the third of the three closes was adjacent to the other two. (c) A farm called the *Quarry Farm*, in the occupation of *John Ganderton*. This farm was wholly within the parish of *Dormstone*, and no question as to it arose in this action. The parish and manor of *Dormstone* were co-extensive.

At the time of his decease the testator was also possessed of two closes of land situate at or near *Stock Green*, in the parish of *Fladbury*; one of those closes was at the death of the testator in the occupation of — *Summers* as tenant thereof, and no question arose in the action in respect of that close; the other was at the death of the testator in the occupation of *Josiah Green*.

The *Bag End* and *Manor Farms* were adjacent to each other,

and *Dormstone* church was only a few yards distant from that portion of the *Bag End Farm* which was in *Inkberrow* parish. The parish of *Dormstone* contained almost 730 acres of land; there were several houses in various parts of it, but there was no village within or on the confines of the parish. *Inkberrow* church was distant about three miles from the close in that parish, and *Kington* church was about the same distance from the closes in the parish of *Kington*. The testator was not at the time of his decease possessed of or entitled to any messuages, tenements, or lands in the parish of *Dormstone* other than those to which reference has been made.

The bill in this suit was filed on the 27th of October, 1875, against the trustees of the will, for the purpose of obtaining a declaration that under the devise of the testator's lands, "situate at or within *Dormstone*," were included the three closes situated in *Kington* parish, and the one close situate in *Inkberrow* parish, and a declaration that under the devise of all his lands "situate at *Stock Green*, then or late in the occupation of — *Summers*," was included the close of land situate at *Stock Green* which was in the occupation of *Josiah Green*.

There was evidence that the separation of the three closes in *Kington* parish from the *Manor Farm*, and of the close in *Inkberrow* parish from the *Bag End Farm*, would seriously depreciate the value of those farms respectively.

The cause was heard before Mr. Justice *Fry* on the 11th of May, 1877.

*Cookson*, Q.C., and *Onslow*, for the Plaintiff:—

As this suit was instituted before the *Judicature Act* came into operation, an objection might be raised as to the jurisdiction of the Court on the ground that the devises are of legal estates. But the objection may be removed by the Court making an order such as was made in *Provident Permanent Building Society v. Greenhill* (1), that the cause shall proceed under the new practice.

FRY, J.:—If the other side do not object, I will make a similar order for what it is worth.

(1) 1 Ch. D. 624.

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C. A.      *Cookson*, Q.C., and *Onslow*, for the Plaintiff:—

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The devise to *C. K. Homer* for life, and the devise in remainder under which the Plaintiff claims, carried the three closes in *Kington* parish and the one close in *Inkberrow* parish. These closes might properly be spoken of as “at” *Dormstone*. The testator uses the words “at or within,” and the word “at” must be construed as meaning something contiguous to, though not within, the parish of *Dormstone*. The reference to the occupation of *Josiah Green* assists the argument, and shews what the testator’s intention was. If he had said in the several occupations of *Green*, *Summers*, and *Ganderton*, there could have been no doubt.

[FRY, J.:—Is there anything to shew that the name of *Dormstone* has been extended by popular usage to anything but the manor and parish?]

There is no evidence of that. But, unless the word “parish” is added, *Dormstone* is not a definite description like “*London*.” *Richardson’s Dictionary* defines “at” as meaning “near approach, nearness or proximity, adjunction or conjunction.” Dr. *Johnson* says “At, before a place, notes the nearness of the place; as, a man is at the house before he is in it.” And the dictionaries of *Latham* and *Webster* give similar definitions. The principles which guide the Court in construing gifts like this are shewn in *Attwater v. Attwater* (1); *Doe v. Bower* (2); *Pogson v. Thomas* (3); *Doe v. Greathed* (4).

It would be very inconvenient that these four closes should be severed from the rest of the two farms, and sold under the trust for sale of the residue. This would be a very capricious intention to attribute to the testator.

[FRY, J.:—In *Martineau v. Briggs* (5) the House of Lords laid it down clearly that the argument *ab inconvenienti* cannot legitimately be resorted to unless there is an ambiguity on the face of the will. What is the ambiguity in the present case which can authorize me to attend to that argument?]

(1) 18 Beav. 330.

(2) 3 B. & Ad. 453.

(3) 6 Bing. N. C. 337.

(4) 8 East, 91, 104.

(5) 23 W. R. 889.



The words "at or within *Dormstone*," if they do not bear the construction which we contend for, are at any rate ambiguous.

[FRY, J.:—If you cannot succeed on the construction of the devise of the life estate to *C. K. Homer*, you cannot succeed on the devise in remainder?]

We admit that.

*Karslake*, Q.C., and *Kenyon Parker*, for the Defendants, were not called upon.

FRY, J.:—

I am of opinion that the Plaintiff's construction is not the true one. The point is a very short one, and I do not think it necessary to hear counsel for the Defendants upon it. I need not say it is quite possible I may be wrong, but still I have formed an opinion, and I will express it at once. [His Lordship stated the facts relating to the *Manor and Bag End Farms*.]

There is no doubt a probability that the testator would intend and desire that the whole of these two farms should pass together, and, if I were at liberty to speculate on what his intention was, it is very probable I should be inclined to hold that he would have desired the whole of these properties to pass together.

[His Lordship then stated the provisions of the will, adding:—]

The will concludes with a residuary gift which, in my opinion, is large enough to carry anything which did not pass by the previous portions of the will. The present question arises under the first of the gifts in remainder on the life estate of *C. K. Homer*, but it is very properly admitted by Mr. *Cookson* that, if the closes in question did not pass by the gift to *C. K. Homer* for life, they did not pass by the devise in remainder under which the Plaintiff claims. Therefore the first question is, did the four closes in question pass by the gift to *C. K. Homer* for life? The words which are relied upon as carrying them are these: "All my messuages, tenements, lands, and hereditaments situate at or within *Dormstone* aforesaid, in the several occupations of *Josiah Green* and — *Summers*." Now it cannot be doubted that, *primâ facie*, in order for the Plaintiff to succeed in her contention she must shew two things. She must shew, in the first place, that

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these parcels of land were situate at or within *Dormstone*, and, secondly, that they were in the occupation of *Josiah Green* or — *Summers*. We have nothing to do with *John Ganderton* now, because the property in his occupation went in a different way in remainder. That these parcels were in the occupation of *Green*, is not in dispute, and therefore that consideration is satisfied by the circumstances of the case. The question, therefore, turns on whether or not these closes come within the description “situate at or within *Dormstone* aforesaid.”

Now, it has scarcely been contended that the word “at,” as applied to a place which may include a farm, does *ex vi termini* carry anything more than lands within that place, and I think that is the true meaning of “at” when applied to a thing which may include another thing. When you say a man is “at” a gate or “at” a door you do not mean that he is within the gate or door, but when you say he is at a town or at a village you mean that he is within the town or village. According to my notion of the ordinary meaning of the English language, when we speak of a man as being at *Oxford* or at *Gloucester* we mean that he is within the ambits of those respective cities. Therefore, if they had stood alone, it would seem to me not to be capable of argument that the words “lands situate at *Dormstone*” meant anything but lands situate within the parish and manor of *Dormstone*, or that they could include lands situate near but not within *Dormstone*.

But, then, Mr. *Cookson* has used this argument. He has said that I am bound to give effect to every word in the will, if effect can be given to it; that to read the word “at” in the way in which I propose to read it is to make it simply equivalent to the word “within,” and that, therefore, the expression “at or within” must mean within or without, provided that which is without be near. He says that, “at” being used in conjunction with the word “within,” the expression must mean something more than “within,” or else it is tautologous. He says, therefore, it must include something without, though he admits that that which is without must be limited by the condition of being near. I should of course give effect to the word “at” as separate from the word “within” if I could, but there is such a thing as tautology, and

that thing is not unknown in legal dispositions, and even in wills, and there are circumstances under which you are unable to give a separate meaning to two words.

Now can I in this case, without doing violence to the language used by the testator, say that the word "at" means without but near? It is really a question of language. In my opinion I cannot. Willing as I should be to give some larger effect to the word "at" than that which is carried by the word "within," if I could, I think that I cannot, because I think that to do so would be to violate the ordinary meaning of language as used by ordinary Englishmen. Therefore I am not able to accede to this ingenious argument.

Then Mr. *Cookson* presents a further argument to this effect. He says that, even if it be not clear that "at" means without but near, by reason of the word "within" being coupled with it, it is at least ambiguous, and that to read it in the one way leads to a convenient, rational, and probable construction, while to read it in the other way is so highly inconvenient that I ought not so to read it. I called his attention to the case of *Martineau v. Briggs* (1) as shewing to how great an extent the House of Lords has rejected the argument *ab inconvenienti* in the construction of wills, and, in my opinion, it is an argument which is to be had recourse to with extreme unwillingness on the part of the Court. That it is eminently probable that the testator did intend that these properties should all pass together, I concede, but that is not the question. The question is whether he has expressed an intention that they should so go. I am of opinion that there is nothing so ambiguous in the words "at or within" as to justify me in looking at the inconvenience which it is said will follow from allowing these four parcels of land to pass by the residuary gift, and therefore, in my opinion, I cannot give effect to Mr. *Cookson's* argument.

There is one other observation which I desire to make, and that is this, that the same expression, "at or within *Dormstone*," occurs in the subsequent devise of the *Quarry Farm*, which is to take effect after the death of *C. K. Homer*. Now that farm was in the occupation of *John Ganderton*, and therefore is included in and described as "at or within *Dormstone*" in the gift to *C. K. Homer*

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for life. Now, separating *Quarry Farm*, as the testator does when he comes to his gifts in remainder, he still describes it as “at or within *Dormstone*.” It is admitted that the whole of that farm is within the parish and manor of *Dormstone*, and that no part of it is without but near, and therefore I do find with regard to this very place *Dormstone* the word “at” used by the testator in a sense which is confessedly tautologous, and that strongly confirms me, if confirmation were needed, in thinking that the word “at” is tautologous when used in respect of the same and other farms in the gift to the tenant for life.

An argument might have been raised that the material part of the description contained in the will is in the reference to the occupations. That argument, for a reason which is sufficiently obvious, was rejected by Mr. *Cookson*. He did not suggest that the description of the lands in the several occupations of *Josiah Green*, — *Summers*, and *John Ganderton*, carried the whole of those lands in whatever parishes they might be. That argument not having been adduced, and, as I think, not being tenable if it had been adduced, I only refer to it to shew that my attention has been drawn to it as a point which might have been urged, though, if it had, I do not think it would have been successful.

I think, therefore, that the four closes in question did not pass by the devise to *C. K. Homer* as tenant for life, and consequently that they do not pass by the gift in remainder to the Plaintiff, but that they do pass by the residuary devise.

Argument.
 ———

Cookson, Q.C., and *Onslow*, for the Plaintiff:—

The devise in remainder of all the testator’s lands situated at *Stock Green* in the occupation of *Summers* includes the land at *Stock Green* in the occupation of *Josiah Green*. The words referring to the occupation of *Summers* are a *falsa demonstratio*, and should be rejected: *Down v. Down* (1); *Stanley v. Stanley* (2).

[FRY, J.:—What do you say is the *corpus* of the description in the present case?]

“All my lands situate at *Stock Green*.” *Hardwick v. Hardwick* (3) is in our favour.

(1) 7 Taunt. 343.

(2) 2 J. & H. 491.

(3) Law Rep. 16 Eq. 168.

[FRY, J.:—Is there any case in which the doctrine of *falsa demonstratio* has been applied where there were only general words of description in the first instance?

Karslake, Q.C.:—*Webber v. Stanley* (1) is a decision the other way.]

The word “all” is very important.

Karslake, Q.C., and *Kenyon Parker*, for the Defendants, were not called upon.

FRY, J.:—

In my opinion the Plaintiff's case fails with regard to this point also. [His Lordship stated the facts and the terms of the devise to *C. K. Homer*, and continued:—]

It is clear that, whatever land there was at *Stock Green* which was in the occupation of *Green*, *Summers*, or *Ganderton*, if *Ganderton* had had any there it would all have passed by the devise to the tenant for life. About that there can be and has been no controversy. The question arises on the first gift in remainder after the death of the tenant for life. [His Lordship read the words.]

Now the tenancy of *Josiah Green* was present to the mind of the testator, because he has referred to him as one of the persons who occupied land at or within *Dormstone*. The contention before me is this, that, notwithstanding that the words limit the gift of land at *Stock Green* to land in the occupation of *Summers*, they include the larger parcel of land there in the occupation of *Green*, and the case is argued on this footing, that there is enough to satisfy me that the testator meant to give all his land at *Stock Green*, and that therefore the words expressive of occupation are *falsa demonstratio* which may be neglected and rejected. I am of opinion that that is not the true construction. It seems to me that I am bound to give effect to every word contained in the description as a necessary part of the description, and that, so far as the gift of lands at *Stock Green* is limited by the expression “in the occupation of *Summers*,” I am bound to give effect to that limitation.

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There are two maxims which have been from time to time used, and which express the two views which have arisen in cases of this sort. The first is, *Falsa demonstratio non nocet quum de corpore constat*; the other is that which has been cited from Lord Bacon's Tracts, *Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*; and the question may in substance be stated in this way. Taking the first maxim in the first place, is there any *constat* of the subject-matter independently of the words which I am asked to reject? If there be, I quite agree that I can reject the words as *falsa demonstratio*; but if there be not, I cannot reject them. Now, in this case I am of opinion that I cannot find any *constat* concerning the subject matter of the gift independently of the words descriptive of the occupation, and I cannot therefore reject those words as *falsa demonstratio*. To apply the other maxim to this case, the question is whether the words are not words of true limitation, whether they are not *verba quæ competunt in limitationem veram*. I see no reason to view them otherwise than as such words. If the testator had been minded to give to the tenant for life all his lands at *Stock Green*, and to give to the persons under whom the Plaintiff claims so much of his lands at *Stock Green* as was occupied by *Summers*, I know not what more proper expression could be used than that which he has used. Such an intention is not insensible, and even if improbable, is not irrational. It is a perfectly rational gift, and one which the testator may well have intended to make.

That being so, I am not satisfied that there has been any error. I may speculate, I may imagine, I may suppose that there has been an error, but I have nothing from which I can come to the judicial conclusion that there was an error in describing the property as in the occupation of *Summers*. I view these words, therefore, as words to which full effect is to be given; they are applicable and competent as a true limitation of the gift, and I confine the devise, therefore, to so much of the land at *Stock Green* as was in the occupation of *Summers*.

The following declarations were made:—First, that the devise to *C. K. Homer* for life did not include the three closes in the parish

of *Kington*, or the one close in the parish of *Inkberrow*. Secondly, that the devise in remainder after the death of *C. K. Homer*, under which the Plaintiff claimed, did not include the three closes in the parish of *Kington*, nor the close in the parish of *Inkberrow*, nor the close situate at *Stock Green* and in the occupation of *Josiah Green*. The costs of the suit were ordered to be paid out of the residuary real estate.

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From this judgment the Plaintiff appealed. The appeal came on to be heard on the 26th of February, 1878.

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Cookson, Q.C., and *Onslow*, for the Appellant, contended, first, that the closes in *Inkberrow* and *Kington* adjoining the parish of *Dormstone* passed under the devise of lands “at or within” *Dormstone*; and, secondly, that the close at *Stock Green* in the occupation of *Josiah Green* passed under the devise of the testator’s lands at *Stock Green* then in the occupation of *Summers*; or if not, that it passed under the devise of lands “at or within” *Dormstone* then in the occupation of *Josiah Green*; the name of the occupier being sufficient designation of the land. On the first question they referred to *Doe v. Greening* (1); *Doe v. Lyford* (2); *Doe v. Greathed* (3); *Stanley v. Stanley* (4); *Webber v. Stanley* (5); *Attwater v. Attwater* (6).

Argument.
—

Karslake, Q.C., and *Kenyon Parker*, for the Defendants:—

With respect to the devise of lands “at or within *Dormstone*,” it is to be observed that the testator has in his will carefully distinguished between the two prepositions. When he refers to a parish he says “in” or “within,” when to a locality he says “at”. He treats *Dormstone* throughout as a parish and a manor, not as a locality, and when he says “at” or “within” *Dormstone* he means within the parish or at the manor, that is, belonging to the manor. “At” means properly nothing more than “within”; and although “at” is sometimes used with more extended signification, the collocation of the words “at or within” shews that the testator

(1) 3 M. & S. 171.

(2) 4 M. & S. 550.

(3) 8 East, 91.

(4) 2 J. & H. 491.

(5) 16 C. B. (N.S.) 698.

(6) 18 Beav. 330.

C. A. did not intend the more extensive signification; otherwise he
 1878 would have said "within or at": *Pogson v. Thomas* (1); *Doe v.*
 HOMER *Bower* (2); *Doe v. Chichester* (3).

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Cookson, in reply on this point.

JAMES, L.J.:—We do not wish to hear counsel for the Respondents on the second question. The point does not seem to us arguable. The testator gives all his lands at *Stock Green* in the occupation of *Summers*. There is no other description than as being in the occupation of *Summers*. On the first question we will consider our judgment.

Judgment, C. A. May 23. BAGGALLAY, L.J.:—
 Baggallay, L.J.

Two questions are involved in this appeal; the first, whether certain closes of land not within the parish of *Dormstone*, but adjacent to other lands which are within that parish, passed under a devise contained in the will of *Richard Homer* of all his messuages, tenements, and lands situate at or within *Dormstone*; and the second, whether a certain other close passed under a devise contained in the same will of all the testator's lands situate at *Stock Green*. [His Lordship then stated the facts of the case, and read the portion of the will set forth above, and continued:—] This suit was commenced on the 27th of October, 1875, and by her bill the Plaintiff prayed, amongst other things, a declaration that the aforesaid close of land situate in the parish of *Inkberrow*, and the aforesaid three closes of land situate in the parish of *Kington*, were included in the devise of all the testator's messuages, tenements, and lands situated at or within *Dormstone* aforesaid; and then in the occupation of the said *Josiah Green*; and a further declaration that she was entitled to the aforesaid close of land at *Stock Green*, which was in the occupation of the said *Josiah Green*. The Defendants are the present trustees of the testator's will, and as such represent all persons who are interested in disputing the Plaintiff's claims.

(1) 6 Bing. N. C. 337.

(2) 3 B. & Ad. 453.

(3) 4 Dow, 65.

Mr. Justice *Fry* decided against the Plaintiff in respect of both claims, and from his decision the present appeal is brought.

As regards the Plaintiff's claim to the closes of land in the parishes of *Inkberrow* and *Kington*, the first question which arises is as to the sense in which the testator has used the words "at or within *Dormstone* aforesaid." Did he mean the parish of *Dormstone* or the manor of *Dormstone* (to which he had just previously referred), or some other locality not limited to the boundaries of either the parish or the manor, but including a further area immediately adjacent or near to the parish or manor, of which a person might fairly have said in the language of every-day life, "I met so-and-so yesterday at *Dormstone*," when the actual place of meeting had been in one of the two parishes of *Inkberrow* or *Kington*, though at a spot within fifty or a hundred yards of *Dormstone* church.

Now, upon this point it is perhaps not immaterial to observe that the testator almost pointedly abstains from the use in any part of his will of the expression "parish of *Dormstone*," though in describing the other properties included in the devise for life to his son he almost invariably mentions the names of the parishes in which they are situate; the properties so included are four in number, and are described in his will as "in the parish of *Kingswinford*, in the county of *Stafford*," "at *Sedgeley*, in the said county of *Stafford*," "in the parishes of *Alveley* and *Emville*, in the counties of *Stafford* and *Salop*," and "in the parish of *Kingsnorton*, in the county of *Worcester*."

Now, having regard to the terms in which the testator has thus referred to the several properties devised by him, I should have been disposed to hold that by the words "*Dormstone* aforesaid" he did not intend to refer to the parish of *Dormstone* alone, but to that more extended district within which portions of his farms were situate; and this view is in my opinion confirmed by the considerations to which I am about to allude.

It has been contended on behalf of the Respondents that the prepositions "at," "in," and "within," when used in reference to localities, have the same meaning; that to speak of a house or lands as being *at Brighton*, is equivalent to speaking of such house or lands as being *in Brighton*, or within the limits parochial, municipal, or otherwise of *Brighton*; and that in the case now under con-

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sideration the prepositions "at" and "within" ought to be treated as equivalents of each other, not only by reason of their general or ordinary meanings, but also by reason of their being combined in the expression "at or within." I am unable to adopt either of these views. I am unable to draw the same inference from the words being combined in the expression "at or within" as has been contended for on behalf of the Respondents. On the contrary, it appears to me that the form of expression indicates that the prepositions "at" and "within" were not used by the testator as equivalent in meaning, and that he considered and intended that the words messuages and lands at *Dormstone* might, and if necessary to give effect to his intentions, should, include something which would not come under the description of messuages and lands within *Dormstone*. That he should so consider and intend could hardly be doubted, if he had transposed the prepositions and had said "within" or "at," and I am unable to apply an interpretation to the words messuages and lands "at or within" *Dormstone* different from that which I should think it right to apply to the words messuages and lands "within or at" *Dormstone*. Again, as regards the suggested equivalent meanings of the prepositions "at," "in," and "within," it appears to me that, though each may occasionally, or indeed frequently, be used in a sense and with a meaning equivalent to the sense and meaning with which the others or either of the others might have been used, the word "at" is frequently used in a sense and with a meaning different from what could be attributed to either of the others.

It appears to me that it would be an inaccurate form of expression to speak of houses or lands as being "at" any locality the bounds or limits of which are at the same time expressly or impliedly indicated, though it would, on the other hand, be perfectly correct to use the preposition "at" in reference to localities as to which no such bounds or limits are indicated. A few short illustrations will explain what I desire to convey. I should not speak of my house "at the county of *Sussex*," or "at the parish of *Brighton*," I should say my house "in," or possibly, though not very probably, "within the county or parish." Again, I should never speak of my house or lands "at *Sussex*," because the bounds or limits of the county would be implied, though the expression

"*Sussex*" might alone be used, but I might with perfect correctness say, I have taken a house "at *Brighton*," or I met so-and-so "at *Portsmouth*," because in so doing I should only indicate a locality known by a general name, without in any manner intending to introduce any idea of parochial, municipal, manorial, or other boundary. It would perhaps be more correct to say that the introduction of the preposition "at" before the name of a locality indicates, or may indicate, an intention on the part of the person using the expression that a meaning should be attributed to the locality named different from that which would be attributed to it if preceded by the preposition "in" or the preposition "within." Again, it is clear from the frame and terms of the testator's will, that in the devise which is now under consideration, and which was to take effect after the decease of the testator's son, the words "at or within *Dormstone* aforesaid" were repeated from the previous devise in favour of the son. Now in the devise to the son, the *Quarry Farm*, in the occupation of *Ganderton*, was included and it comprised a farmhouse and lands which were within the parish of *Dormstone*; and when instead of saying "my messuages and lands in the parish of *Dormstone*," which would have been sufficient to pass all messuages and lands within that parish, if that was all he intended to pass, and would have been in accordance with the language used by him in reference to messuages and lands in other parishes, we find the testator introducing the preposition "at" and omitting any reference to the parish, the inference is almost irresistible that he intended to describe a district more extensive than that which would be defined by the parish boundary.

But the preposition "at" is not unfrequently used in the sense of "near to" or "adjacent to"—as, "my cottage at the cross roads," "my lands at the turnpike gate;" and even if it were necessary to attribute to the word "*Dormstone*," as used in the devise in question, a meaning limited as regards its area to the parish or the manor, the closes in *Inkberrow* and *Kington* parishes would fairly come within the description of being near or adjacent to such parish or manor.

Having regard to all the circumstances to which I have alluded, I am unable to adopt any other construction of the devise now

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As regards the second question involved in the appeal, we expressed our concurrence in the view taken by the learned Judge at the close of the Appellant's case, without calling upon the counsel for the Respondents. The close of land in question was not in the occupation of *Summers*, and it consequently could not pass under the devise of all the testator's messuages and lands "at *Stock Green* in the occupation of *Summers*," but it was contended on the part of the Appellant that it passed under the devise of all the testator's messuages and lands "at or within *Dormstone* in the occupation of *Josiah Green*." It is quite true, as has been already stated, that the close was in the occupation of *Josiah Green*, and to that extent answered the description given in the devise, but having regard to the circumstance that it was a detached field distant three quarters of a mile from *Dormstone* church, and more than half a mile from the nearest point of any of the testator's farms which were situate in the parish of *Dormstone*, and still more to the circumstance that it was situated in a locality which had its own distinctive name of "*Stock Green*," it appears to me to be impossible to hold that it passed under a devise of the testator's land at *Dormstone*.

A number of cases have been cited in the course of the appeal, but having regard to that which appears to me to be the real question for consideration, it does not appear to me that these cases have much bearing upon it.

As regards *Doe v. Greening* (1), *Doe v. Lyford* (2), and *Doe v. Chichester* (3), all that they established is this, that where a testator has devised all his lands at any particular place, extrinsic evidence is not admissible for the purpose of shewing that he intended to pass other lands not situated at that particular place, either by reason of such other lands having been enjoyed with the lands at the specified place for a lengthened period of time, or of the testator having dealt with them as one property, or of his having been in the habit of referring to them as forming one

(1) 3 M. & S. 171.

(2) 4 M. & S. 550.

(3) 4 Dow, 65.



property under one distinguishing name, but in neither of these cases was any question raised as to the precise meaning of words describing the lands of which the testator was possessed as being at the named locality. And so, again, all that was decided in *Doe v. Bower* (1) was, that a devise of all the testator's messuages at, in, or near a street called *Snig Hill*, in *Sheffield*, the testator being possessed of four houses answering this description, would not pass two other houses of which he was possessed, but which were situated in *Gibraltar Street*, distant a quarter of a mile from *Snig Hill*; and all that was decided in *Attwater v. Attwater* (2) was, that a devise of the testator's leasehold property situate at *Chilhampton*, in the parish of *South Newton*, would not include other leaseholds in the same parish, but situate at some distance from *Chilhampton*; and *Pogson v. Thomas* (3) is to the same effect. Neither of these cases have any bearing upon the question as to the proper interpretation to be put upon the words "at *Dormstone*," though all of them are, in my opinion, direct authorities for the view which I have expressed upon the second question involved in this appeal.

It is unnecessary, in my opinion, to refer more particularly to the other cases cited.

JAMES, L.J.:—

I so entirely agree with the judgment of the Lord Justice, in which Lord Justice *Thesiger* also concurs, that it may appear almost superfluous to read the short postscript which I have written.

According to *Richardson's Dictionary* "at" is used to denote near approach, nearness or proximity, adjunction or conjunction, association or consociation, connection; and that would seem to be its natural or ordinary idiomatic use in the English language. It may sometimes be equivalent to "in" or "within," but not because the word itself includes the idea of "inclusion" within limits, but by reason that inclusion involves association or consociation.

You say "I met *A.* at *B.'s* house," not because the meeting was actually inside the house, but because the idea intended to be conveyed is the consociation of the meeting with that particular

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(1) 3 B. & Ad. 453.

(2) 18 Beav. 330.

(3) 6 Bing. N. C. 337.

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house, and it would be equally true whether the meeting was inside or outside the hall door. You do not naturally or properly say "at a manor" or "at a parish," but "within" or "in the manor or parish," but you do say "at a village," because a village is not a defined district, and you can only express association or connection with the village for which "at" is the appropriate preposition.

If I say lands "within" or "in the manor of *Dale*," or "within" or "in the parish of *Dale*," the expression is clearly one denoting locality within a particular district, and indeed forming part of it; but if I say lands at *Dale*, I only express lands having such a connection with *Dale* as to be by such description identified by any one who knows the lands, and who knows *Dale*, the church, and village or place which has given its name to the manor or parish. Again, the words "at or within" do not naturally mean "at," that is to say, "within," but ordinarily mean "whether at or within," that is to say, they include any lands of which you would predicate that they were "at," or of which you would predicate that they were "within." Having, then, this kind of expression to deal with, I put aside entirely all history of past dealings with the lands, and ask this question: What would the words mean in the mouth and ear respectively of two ordinary Englishmen knowing the district or place and the property, as for instance, in a grant of the rights of sporting? Surely a right of sporting, in the very words of this will, would extend over the pieces of land the subject of the present suit. If a surveyor were directed to make a map of the lands of the testator "at or within *Dormstone*," he would make a map including the lands in question. The words ought to have the same meaning in the will.

Solicitor for Plaintiff: *F. F. Smallpeice*, agent for *Smallpeice & Sons, Guildford*.

Solicitor for Defendants: *Alexander Hemsley*, agent for *Deakin Dent, & Son, Wolverhampton*.

## WILSON v. RHODES.

[1877 W. 74.]

*Parties—Breach of Trust—Action by Cestui que Trust against Representatives of one only of several Trustees—Legacy—Presumption of Assent of Executors and Appropriation of Fund—Payment of Interest—Consolidated Orders of Court of Chancery, Order VII, r. 2.*

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A testator bequeathed the residue of his personal estate to three trustees, *R.*, *L.*, and *I.* (who were also his executors), upon trust to invest the same, and to pay the income to his widow for her life, and after her death "to lay out and invest or retain invested" £850, and to pay the income of £500, part thereof, to his daughter *M.* for her life, with remainder to her children, and upon trust to pay the income of the remaining £350 to his daughter *B.* for her life, with remainder to her children. And, in the event of the death of his daughter *M.* without issue, her share was to be divided among *L.*, *I.*, and *B.* The testator died in December, 1854, and his widow died in June, 1856. The daughter *M.* died in January, 1859, without issue. After the death of the widow *R.* began to pay interest to *B.* on £350, and after the death of *M.* on £516 13s. 4d. (*i.e.*, on the £350 and one-third of the £500), and continued the payment half-yearly until his death, which took place in September, 1863. Part of the estate of the original testator consisted of a sum of £1200 lent upon mortgage. Before the death of *R.* £700, part of this sum, had been paid off by the mortgagor in instalments. For some of these instalments *R.* alone gave receipts, and he joined in the receipts for others. After *R.*'s death, *J.*, one of his executors, continued to pay interest to *B.* on £516 13s. 4d. until June, 1874, when the payment ceased. He made these payments with the knowledge of his co-executors and of the persons beneficially interested in *R.*'s estate, and the payments were admitted as proper deductions upon a half-yearly settlement of the accounts of the income of *R.*'s estate made between the executors and the beneficiaries. The £500 remaining due on the mortgage was paid off by instalments after the death of *R.*, the receipts for the instalments being signed by his executor *J.*, as "for the executors" or "for the trustees" of the original testator. *J.* paid one-third of the £500 to *L.*, and another third to *I.*, and retained the remaining one-third. In 1877 *B.* commenced an action against the executors of *R.* alone, claiming to have the sum of £516 13s. 4d. and the arrears of income made good out of the estate of *R.* :—

*Held*, by *Fry, J.*, that, as *R.*'s executors could not properly have paid interest to *B.* after his death, unless the executors of the original testator had assented

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to the legacy and had set apart in the hands of *R.* a fund to meet it, it must be assumed that such an appropriation had been in fact made :

And, therefore, that *B.* was entitled to sue the executors of *R.* alone, without making the other trustees of the original testator parties.

And the executors of *R.*, admitting assets, were ordered to make good the £516 13s. 4d., with the arrears of income, out of his estate.

On appeal the Defendants waived the objection as to want of parties, and the judgment of *Fry, J.*, was affirmed.

Statement.  
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*EDWARD LAMBERT*, by his will, dated the 14th of February, 1852, appointed *Bryan Cowgill, Isaac Rhodes*, and his sons *James Lambert* and *Isaac Lambert*, trustees and executors thereof, and he bequeathed to them the residue of his personal estate, upon trust to invest the same as therein mentioned, and to pay the income thereof to his wife, *Sarah Lambert*, for her life, and after her death to lay out and invest or retain invested as therein mentioned the sum of £850, and to pay the income of £500, part thereof, to his daughter *Mary Berry* during her life, and after her death to stand possessed of the £500 upon trust for the children of *Mary Berry* as therein mentioned ; and upon trust to pay the income of the remaining £350 to his daughter *Betty*, the wife of *Samuel Blamires*, (one of the Plaintiffs), during her life, for her separate use, and after her death to stand possessed of the £350 in trust for her children as therein mentioned ; provided, that in case his son *James* and his daughters *Mary* and *Betty*, or either or any of them, should die without leaving lawful issue living at his or her decease, or who should die before attaining twenty-one, then their shares of his estate should go to and be divided between and amongst his other surviving children and their issue in like manner as their original share or shares were directed to be paid and divided. The testator died on the 23rd of December, 1854. His will was proved by *Isaac Rhodes, James Lambert*, and *Isaac Lambert*. *Bryan Cowgill* never proved the will, and he disclaimed the trusts thereof. *Sarah Lambert* died on the 1st of June, 1856. *Mary Berry* died on the 28th of January, 1859, without ever having had any issue, and thereupon *Betty Blamires* became entitled to the income for her life of £166 13s. 4d. (one-third of the £500 bequeathed to *Mary Berry*) in addition to the income of £350 to which she became entitled for her life on the death of the testator's widow ; *i.e.*, to the income of



£516 13s. 4d. altogether. The Plaintiff *Joseph Wilson* was a mortgagee of the life interest of *Betty Blamires*. At the time of the death of the testator there was due to him a sum of £1200, upon a mortgage of some freehold property belonging to one *John Hartley*. *Isaac Rhodes* died on the 4th of September, 1863, having by his will appointed his sons *John Rhodes*, *Thomas Rhodes*, and *James Rhodes* executors thereof, and they all proved his will. *Isaac Rhodes* advanced *Betty Blamires* £50, part of the £516 13s. 4d., and he paid her interest half-yearly at the rate of 5 per cent. upon £350 after the death of the widow, and upon £466 13s. 4d. after the death of *Mary Berry* until his own death, and after his death his executors continued the half-yearly payment to *Betty Blamires* until June, 1874. This action was commenced on the 17th of February, 1877, by *Joseph Wilson* and *Betty Blamires* (suing by a next friend) against the three executors of *Isaac Rhodes* and the husband of *Betty Blamires*. The statement of claim alleged that after the death of *Edward Lambert* his trustees appropriated £850, part of the mortgage debt of £1200, in satisfaction of the two legacies of £500 and £350 bequeathed by his will; that *Isaac Rhodes*, from the date of the appropriation, received the interest on the mortgage debt as it accrued due, and the instalments of principal which were from time to time paid off by *Hartley*; and that *Isaac Rhodes* assumed to act as, and was in fact, the sole trustee of the appropriated fund, and that his executors, by paying interest to *Betty Blamires*, had admitted the appropriation. *James Lambert* died in February, 1877, before the writ was issued. *Isaac Lambert* was in *New Zealand*.

The Plaintiffs claimed a declaration that the Defendants, as the executors of *Isaac Rhodes*, were liable to make good the sum of £516 13s. 4d. and all arrears of income in respect thereof; and that they might be ordered to admit assets of their testator, or that his estate might be administered by the Court.

The Defendants *John* and *Thomas Rhodes* by their statement of defence denied the alleged appropriation, and submitted that *Isaac Lambert* and the personal representatives of *James Lambert* were necessary parties to the action.

The action came on for trial before Mr. Justice *Fry* on the 17th of December, 1877.

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James Rhodes did not deliver any statement of defence, but he appeared by counsel at the trial.

It was in evidence that between the time of *Edward Lambert's* death and the time of the death of *Isaac Rhodes* £700, part of the £1200 mortgage debt, was paid off by *Hartley*. The payment was made in ten instalments. The first was of £30, on the 6th of June, 1856; the second of £20, on the 16th of August, 1856; the third of £10, on the 5th of September, 1856; the fourth of £12, on the 15th of November, 1856; the fifth of £50, on the 9th of January, 1857; the sixth of £178, on the 8th of April, 1857; the seventh of £100, on the 6th of May, 1857; the eighth of £200, on the 12th of June, 1860; the ninth of £50, on the 30th of November, 1860; the tenth of £50, on the 29th of November, 1861. The receipts for the first, second, fifth, and sixth instalments were signed by *James Lambert* and *Isaac Lambert*. The receipts for the third and fourth instalments were signed by *Isaac Lambert* alone. The receipt for the seventh instalment was signed by *Isaac Lambert*, *Isaac Rhodes*, and *James Lambert*; the receipt for the eighth instalment was signed by *Isaac Rhodes* and *James Lambert*. The receipts for the ninth and tenth instalments were signed by *Isaac Rhodes* alone. These last two receipts included also respectively two sums of £15 and £13 15s. for interest. The balance of £500 was paid off after the death of *Isaac Rhodes* in eight instalments. The first of £50, on the 14th of October, 1863; the second of £30, on the 9th of January, 1864; the third of £20, on the 2nd of May, 1864; the fourth of £187, on the 18th of August, 1865; the fifth of £13, on the 30th of August, 1865; the sixth of £55, on the 11th of December, 1865; the seventh of £30, on the 5th of November, 1866; and the eighth of £115, on the 21st of February, 1867. The receipts for the first four instalments were signed by *James Rhodes*, "for the executors," or "for the trustees of the late *Edward Lambert*;" the receipt for the fifth instalment was signed "*John Rhodes* for *James Rhodes*;" the receipt for the sixth instalment was signed "for the executors, *James Rhodes*;" the receipt for the seventh instalment was signed "*James Rhodes*;" and the receipt for the last instalment was signed "*James Rhodes*, mortgagee's solicitor; *James Lambert*." After the mortgage debt had been paid off a release of the land from the debt was pre-

pared. It bore date the 1st of August, 1870, and was made between *James Lambert* and *Isaac Lambert* of the one part, and *Hartley* of the other part. It contained a recital that *Hartley* had paid off the principal with interest to *James Lambert* and *Isaac Lambert*, and, in consideration of his having done so, it was witnessed that they released the land from the debt. This deed was executed by *James Lambert* only.

By the evidence of *Betty Blamires*, it appeared that *Isaac Rhodes* advanced her £50 on account of the £516 13s. 4d., and that after this he paid her half-yearly £11 13s. 4d. for interest on £466 13s. 4d., and that this payment was continued after his death by *James Rhodes*, to whom she applied for the payment, up to July, 1874, when it ceased.

By the evidence of *James Rhodes*, it appeared that he was aware of the claim of *Betty Blamires* soon after his father's death. He paid her £11 13s. 4d. (a half-year's interest at 5 per cent. on £466 13s. 4d.), in December, 1863, and he continued to pay her the same sum half-yearly in June and December down to June, 1874. The payments were made out of half-yearly rents belonging to his father's estate. These rents were received by him for some years, and afterwards by his brother *John*. When he received the rents he made the payments to Mrs. *Blamires* out of them; when his brother *John* received them he got the money to pay her from him. His father left seven children, who were equally interested in the rents. They all met together every half year to settle accounts, and the payment to Mrs. *Blamires* was always allowed at these half-yearly settlements as a deduction from the gross rents. He admitted that he had received £500 after his father's death from *Hartley* in instalments, and said that he had divided the £500 into thirds, paying one third to *James Lambert* for himself, and another third to *James Lambert* for his brother *Isaac Lambert*. Out of the other one-third he said that he had paid £50 to his brother *John* and £50 to his brother *Thomas*, and that the remainder of it went against the payments of interest which he had made to Mrs. *Blamires*. *John Rhodes* and *Thomas Rhodes* were examined, and they admitted that *James Rhodes* told them that their father owed some money to Mrs. *Blamires*, though he did not explain on what account, and

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that they knew of the payments made to her by *James Rhodes*. They denied that he had paid them the sums of £50 each.

The Defendants at the Bar admitted assets of *Isaac Rhodes* to answer the Plaintiffs' claim.

North, Q.C., and W. Barber, for the Plaintiffs:—

The facts in evidence, and especially the payment of interest to the Plaintiff down to July, 1874, necessarily lead to the inference that a fund was appropriated to answer the legacy to *Mrs. Blamires*, and that it was held by *Isaac Rhodes* for the purpose of paying her and the other persons interested in it. We are right, therefore, in suing his executors alone.

Cookson, Q.C., and Bardswell, for John Rhodes and Thomas Rhodes:—

Isaac Lambert and the executors of *James Lambert* ought to be made parties. Order VII., rule 2, of the Consolidated Orders of the Court of Chancery is still in force, and it does not authorize the Plaintiffs to proceed against the executors of *Isaac Rhodes* alone: *Shipton v. Rawlins* (1); *Morgan's Chancery Acts* (2).

[FRY, J., referred to *Perry v. Knott* (3).]

It is clear that *Isaac Rhodes* received the mortgage money jointly with his co-trustees, and the receipts given after his death were given on behalf of the trustees of *Edward Lambert*, or as solicitor for the mortgagees. No appropriation of the mortgage money is proved as against *Isaac Rhodes*; what may have been done after his death cannot affect his estate. Even if from the payment of interest to *Mrs. Blamires* it must be assumed that the executors of *Edward Lambert* had assented to the legacy, it does not follow that any particular fund was appropriated to meet it. Appropriation is a distinct step from assent. The Plaintiffs' case must rest upon an appropriation of a fund, and that is not proved by the evidence. We are not estopped by any act of our co-executor *James Rhodes*. If a breach of trust was committed after the death of *Isaac Rhodes*, his surviving co-trustees, *James Lambert* and *Isaac Lambert*, are the persons liable for it. The release

(1) 4 Hare, 619.

(2) 5th Ed. p. 474.

(3) 5 Beav. 293.

of the 1st of August, 1870, rebuts any presumption that *Isaac Lambert* had constituted himself the sole trustee of the fund which may arise from what was done by his executors after his death.

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Kekewich, Q.C., for *James Rhodes*:—

[FRY, J.:—My difficulty is that I find payments made by the executors of *Isaac Rhodes* immediately after his death, which they had no right to make if he had been simply one of the trustees of *Edward Lambert's* will, but which they would have been right in making if a fund to meet this legacy had been appropriated and was in his hands.]

It ought not to be presumed that the fund was left in the hands of *Isaac Rhodes* alone by his co-trustees, as that would be an assumption that they were parties to a breach of trust.

North, in reply.

FRY, J., after stating the provisions of the testator's will, and the dates of his death and the death of his widow, continued :—

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Upon her death in 1856, there being, as it appears, assets of the testator, it was the duty of the three trustees to invest or retain invested a sum to meet the legacy of £850. I find that they did make payments of the interest on £350 to Mrs. *Blamires* shortly after the death of her mother, from which I infer that there were sufficient assets to pay the debts of the testator, and that the executors assented to the legacy, and I must further hold that they must be then presumed or inferred to have invested or retained invested that sum of £850 upon the securities which are mentioned in the will. I infer that all those things were done, because, in my judgment, the payment of interest to Mrs. *Blamires* could not rightly be made until the legacy was assented to, and the investment or appropriation had been made.

In January, 1859, *Mary Berry* died, and thereupon the £500 which had been bequeathed to her for life went over in thirds to Mrs. *Blamires* and her two brothers. After that event the sum paid to her represented the interest on £350 and £166 13s. 4d. (which was one-third of the £500), less the interest on the sum of

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£50, which she owed to her father's estate. Therefore the interest paid to her after the death of Mrs. *Berry* was on £466 13s. 4d.

It appears that at the time of the death of Mrs. *Sarah Lambert*, the tenant for life, the entire amount of £1200 remained due upon *Hartley's* mortgage, but that before the death of *Isaac Rhodes*, in 1863, no less than £700 had been paid off, leaving only £500 due. For that £700 receipts had been given, in two of which, for sums amounting in the aggregate to £300, *Isaac Rhodes* had joined, and he alone signed two other receipts for £50 each.

Now, on the death of *Isaac Rhodes*, supposing that the £350 had been properly dealt with, it would have been in the hands of *James Lambert* and *Isaac Lambert*, as the surviving trustees, and the estate of *Isaac Rhodes* would have had nothing to do with the payment of the £350 or of interest upon it. Furthermore, supposing matters had taken their ordinary and proper course, the legal interest in the mortgage, and the right to receive the £500, would have remained vested in *Isaac Lambert* and *James Lambert* alone, and they would have been the persons to receive the money due on the mortgage after the death of *Isaac Rhodes*, and they, and they only, would have been the persons liable to make the payment to Mrs. *Blamires* of interest upon the £466 13s. 4d.

Now, what was the course which things actually took after the death of *Isaac Rhodes*? In the month of December after his death Mrs. *Blamires* applied to *James Rhodes*, one of the executors of *Isaac Rhodes*, for payment of the amount which had always been previously paid to her by *Isaac Rhodes*, and that payment was made by *James Rhodes*, and it continued to be made by him down to June, 1874, a period of nearly eleven years. That payment was allowed by all the executors of *Isaac Rhodes*. It appears that a portion of the income of the estate of *Isaac Rhodes* was received by *James Rhodes*, and whilst he so received it he deducted from the moneys which he brought into account the sums which he had paid to Mrs. *Blamires*. It appears that after three or four years he ceased to receive either all or so much as he had previously received, and *John Rhodes* appears to have been then the principal receiver, at any rate he received a portion of the rents, and out of that portion he from time to time made payments to *James Rhodes* of the half-yearly amount of

interest due to Mrs. *Blamires* in order that *James* should pay them, as he accordingly did, to Mrs. *Blamires*. The sums which in the course of those eleven years were so paid by one or other of the executors to Mrs. *Blamires* were deducted by them in the settlement which they made from half-year to half-year with their brothers and sisters, who were interested under the will of *Isaac Rhodes*. It appears that *Isaac Rhodes* left seven children, of whom three were executors and four were not, and the habit of the family was to make a half-yearly settlement, dividing the income, after all due deductions, amongst the seven children, and amongst the deductions which were made from the sums so divided was the sum which was paid half-yearly to Mrs. *Blamires*.

Now, I think I am bound to assume as against the Defendants that that deduction was properly made. There is one view of the case in which it might have been properly made, viz., if *Isaac Rhodes* had received the £350, and if, by agreement between himself and his co-trustees, the *Lamberts*, it had been arranged that he should be deemed to be the holder of the £350. I infer that to have been the case, because in that way, and in that way only, can I make the conduct of the Defendants proper, legitimate, and lawful, as against their own *cestuis que trust*.

Well, the matter does not stop there, for the £500, which remained due on the mortgage at the date of *Isaac Rhodes'* death, was subsequently received. It appears that the receipts were given, at any rate sometimes, in the name of the executors of the original testator *Edward Lambert*, and they were in every case but one signed by *James Rhodes*. The last of them was given on the 21st of February, 1867. Now, if the supposition which I have made, or the inference which I have drawn, is correct, it would follow that that money, or so much of it as went to meet the £466 13s. 4d., would be received by the estate, or would commingle with the estate, of *Isaac Rhodes*. If the inference I have drawn is wrong that money would have found its way into the hands of the *Lamberts*. If it had found its way into the hands of the *Lamberts* it is almost incredible that the executors of *Isaac Rhodes* should have continued to pay interest upon it.

Now what happens is this—of the £500 so received it appears

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that £166 13s. 4d. found its way into the hands of *James Lambert* as representing the one-third which went over to him upon *Mary Berry's* death. Another similar sum found its way into the hands of *Isaac Lambert*, as representing the one-third to which he was beneficially entitled. But the remaining one-third never found its way into the hands of the *Lamberts*, as it ought to have done if the £500 had remained vested in them as the surviving trustees and executors of their father, but it was commingled with the estate of *Isaac Rhodes* in this sense, that *James Rhodes* says he paid £100 of it to his brothers (that is in dispute), but the remaining £66 13s. 4d. he says he can only account for by saying that it went to pay interest. That is, he means to say it went into the estate of *Isaac Rhodes* against the sums which were paid half-yearly by that estate to Mrs. *Blamires*, and I have no evidence to the contrary.

Now it appears to me clear that, if the conclusion I have come to is wrong, that £500, or the balance of it after paying *James* and *Isaac Lambert* their respective shares, would have found its way into their hands as surviving trustees. It appears to me clear that it did not find its way into their hands, and that the executors of *Isaac Rhodes* knew that it did not, because, after the last payment in respect of the mortgage debt took place on the 21st of February, 1867, they went on for another seven years paying interest to Mrs. *Blamires*, as though that money had come to the estate of *Isaac Rhodes*. I think therefore I am bound to come to the conclusion that by the arrangement between the parties *Isaac Rhodes* had made himself primarily responsible for the whole of the £466 13s. 4d., and the Plaintiffs therefore have rightly brought their action only against the persons who represent his estate.

No doubt a release has been shewn by which the two *Lamberts* alone release *Hartley*, acknowledging that they have received the whole amount due on the mortgage. It may be a question whether that release is evidence against the present Plaintiff. But even if it be, it appears to me consistent with the conclusion to which I have come, because undoubtedly *James Lambert* and *Isaac Lambert* were the legal personal representatives of the original testator *Edward Lambert*, and if, by an arrangement of

the kind which I have inferred to have been made, they had allowed the money to be received by *Isaac Rhodes*, they, nevertheless, were the proper persons to give a discharge to the mortgagor. Therefore the recital that they had received the money is consistent with its having been received by the person who they agreed should receive it.

I must therefore make a declaration that the three Defendants, the executors of *Isaac Rhodes*, are, as his representatives, liable to make good the £466 13s. 4d., with the arrears of interest. The £466 13s. 4d. must be paid into Court.

From this decision the Defendants, the executors of *Isaac Rhodes*, appealed. The appeal was heard on the 24th of May, 1878.

Cookson, Q.C., and *Bardswell*, for the Appellants, followed the the same line of argument as in the Court below.

Before the argument was concluded, however, they elected to waive the objection for want of parties.

North, Q.C., and *W. Barber*, for the Plaintiff, were not called on.

JAMES, L.J. :—

The Appellants not insisting on the objection for want of parties, we do not desire to hear the counsel for the Respondent. I think they are quite right in not insisting on the objection; for it would not have been worth while to make *Isaac Lambert*, who was in *New Zealand*, and the executors of *James Lambert*, parties for the sake of getting contribution from them. It would have been attended with great expense, and no good would have been gained by it.

Under these circumstances the question who ought to be made parties to an action for a breach of trust under the present practice, which Mr. *Bardswell* has represented as of such pressing importance to the junior members of the Bar, cannot now be decided, but must be adjourned to some future day, as it does not arise in the present case. But it is obvious that there was a legacy due to this lady which was not paid. There were assets sufficient for its payment, therefore the executors ought to have

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C. A. paid it, or ought to have appropriated and invested it. It is no
 1878 answer to her complaint that the other executors may have joined
 ~~~~~ in the breach of trust. What the executors did among themselves  
 WILSON is a matter really unimportant in this view of the case. As the  
 v. Defendants are unquestionably liable and the question of parties  
 RHODES. is waived, the Plaintiff is clearly entitled to enforce that liability  
 Judgment, C. A. in this action. The judgment must therefore be affirmed, and the  
 James, L.J. Defendants must pay the costs of the appeal.

Baggallay, L.J. BAGGALLAY, L.J. :—

I am of the same opinion. Mr. Justice *Fry* decided the case on a ground which made it necessary for him to consider the question of pleading, namely, whether the proper parties were before the Court. In this Court the objection for want of parties has been waived. Therefore it is unnecessary to express an opinion on that point. There can be no doubt that the Defendants are liable. The judgment of the Court below must therefore be affirmed.

Bramwell, L.J. BRAMWELL, L.J., concurred.

Solicitors for Plaintiffs: *Torr & Co.*, agents for *Lancaster & Wright, Bradford, Yorkshire.*

Solicitors for Defendants: *Layton & Jaques*, agents for *A. Neill, Bradford.*

WILLIAMS *v.* WILLIAMS.

[1876 W. 387.]

*Gift of "Moneys that may be left after my Decease"—Residuary Gift.*

A testator by his will directed his trustees and executors to pay his debts and funeral and testamentary expenses out of his personal estate, and if that should be insufficient, he charged them on his real estate; and he bequeathed all the rest and residue of his personal estate to his daughters. By a codicil, after making alterations in the dispositions of his real estate, he proceeded: "As to all moneys that may be left after my decease, I give and bequeath the same" upon the trusts therein mentioned:—

*Held*, by *Hall*, V.C., that the gift in the codicil was a residuary bequest of the personal estate revoking the residuary gift in the will.

*Held*, on appeal, that the gift in the codicil was only a gift of the money which was in the testator's hands at his death; and that, subject to this exception, the residuary gift in the will remained in force.

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V.-C. H.

Feb. 19,

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June 1.

17<sup>th</sup> D 82  
 8 P D 203  
 25<sup>th</sup> D 153

**RICHARD WILLIAMS**, by will dated the 18th of July, 1863, in the first place desired his debts, funeral and testamentary expenses, to be paid, and directed the same to be paid out of his personal estate, and if that should be insufficient, then he charged the said debts and expenses upon all his real estates rateably. He appointed trustees and executors, and then disposed of his real estates as therein mentioned. Provided always and he directed his trustees and their heirs within two years after his decease to cut or sell all the timber and trees then growing in or upon his farms called *Tyddyn Sheffrey* and *Cwm Idiol*, and to pay and apply the produce and proceeds towards the discharging of any debts due from him at the time of his decease. He also directed his trustees to sell and dispose of all the farming stock and furniture that might be at *Pentrebach* at his death, and pay and apply the proceeds thereof in like manner towards liquidating his debts; and he gave and bequeathed all the rest and residue of his furniture, and all other his personal estate of what nature or kind soever, to his daughter *Jane Williams*, her heirs and assigns.

The testator, by a codicil dated the 9th of January, 1866, after making various alterations in the disposition of his real estates, proceeded as follows: "As to all moneys that may be left after my decease, I give and bequeath the same unto my said children,

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*William, Jane, and Mary*, share and share alike, but in trust to the trustees named in my will to be placed by them on mortgage or in the public funds, and the interest accruing therefrom to be divided equally between them, and after their decease unto my grandchildren in equal proportions."

The testator died on the 5th of July, 1871, and a suit for the administration of his estate now came on for further consideration. One question that arose was, whether the above gift in the codicil passed the residuary personal estate.

The action was heard before Vice-Chancellor *Hall* on the 19th of February, 1877.

*Dickinson*, Q.C., and *Kekewich*, Q.C., for *Jane Williams*.

*W. Pearson*, Q.C., and *J. A. Creed*, for parties claiming under the gift in the codicil.

*Cracknall*, for other parties.

*Freeling*, for the trustees.

Judgment,  
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HALL, V.C.:—

It appears to me upon this will and codicil that the gift in the codicil of all moneys which may be left after the testator's decease is a residuary bequest. The testator by his will directed all his debts, funeral and testamentary expenses, to be paid, and he directed the same to be paid out of his personal estate, and if that should be insufficient, then he thereby charged the debts upon his real estate; and then he made certain provisions for paying his debts by means of raising money, and from the income to be received for a couple of years arising from the timber; and then he directed the farming stock and furniture to be sold, and the proceeds to be applied towards liquidating his debts; and then he gave and bequeathed all the rest and residue of his furniture, and all other his personal estate of what nature or kind soever, to his daughter *Jane Williams*, her heirs and assigns. Of course, that residuary gift was a gift of the furniture and other portions of the personal estate, subject to the directions before contained for the payment of his debts; and when in the codicil he says, "as to all moneys that may be left after my decease," he must, I consider,



have been referring to and describing that rest and residue of his personal estate which there would be after paying the debts which are directed to be paid by the will. It therefore comes to this, that it is a gift of the rest and residue of what shall remain after paying the debts, the whole of the personal estate being applicable to that purpose. In a rough and not an uncommon mode of describing property, the word "moneys," which is used in this codicil, appears to me to be descriptive of his personal property generally which would remain after paying his debts. That being so, I hold it to be a residuary bequest passing the whole of the personalty.

*Jane Williams* appealed from this decision. The appeal was heard on the 1st of June, 1878.

*Kekewich*, Q.C., for the Appellant :—

I contend that the Vice-Chancellor was wrong in holding a gift of the moneys remaining to be a gift of the residuary personal estate, and that the gift by the codicil is merely a specific gift of the testator's money properly so called. The most material item is a mortgage for £2000, which forms part of the residuary personal estate, and would not pass under a gift of "money." *Langdale v. Whitfeld* (1) was relied on below, but the circumstances there were very special, and the case really is in my favour, for it lays down the general rule very strongly in accordance with *Lowe v. Thomas* (2), which is the leading case on the subject.

*W. Pearson*, Q.C., and *J. A. Creed*, for parties claiming under the gift in the codicil :—

It is not very material to the parties how this case is decided, for if the gift in the codicil is a gift of money only it is a specific gift, and the other personalty must be applied first. But we submit that the gift in the codicil is a new residuary gift: *Rogers v. Thomas* (3); *Dowson v. Gaskoin* (4); *Stocks v. Barré* (5).

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WILLIAMS.Judgment,  
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Argument.

(1) 4 K. &amp; J. 426.

(2) Kay, 369; 5 D. M. &amp; G. 315.

(5) J6h. 54.

(3) 2 Keen, 8.

(4) Ibid. 14.

C. A. [BAGGALLAY, L.J.:—There is no express revocation of the residuary gift in the will; cannot the two stand together?]  
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 WILLIAMS.  
*Cracknall*, in the same interest, referred to *Theobald* on Wills (1).  
*Freeling*, for the trustees.

Judgment, C. A. JAMES, L.J.:—  
 James, L.J.

The Appellant is entitled to have her rights declared and ascertained, though it may be, as Mr. *Pearson* has pointed out to us, that she will not gain much by this appeal, because it cannot be doubted that if the gift of the money is a specific gift, the rest of the property must go in exoneration of it to pay the debts and the funeral and testamentary expenses and costs of suit. I think, whatever may be the meaning of the word “moneys” under other circumstances, and whatever enlarged meaning has been given to it by reason of the context, the context here is opposed to such extension. Lord Justice *Baggallay* has drawn the attention of counsel to the circumstances that there is a clear residuary bequest in the will, and that in the codicil there is no revocation of that bequest, but merely a gift of “all moneys that may be left after my decease.” The natural meaning of that expression is, not “all moneys that may be left after my debts and funeral and testamentary expenses have been paid,” but “all moneys that may be left at my decease.” Therefore we have a gift of the residue of the personal estate by the will, and we have a gift by the codicil of moneys left “after my decease.” Those two dispositions may well stand together, and there is a well-known rule that the original gift is not revoked unless it be by express words or necessary implication. I do not find here express words of revocation, and I do not find a plain implication amounting to a revocation. I therefore think that the original bequest must stand, and that the gift in the codicil is a gift of moneys as a specific bequest.

*Baggallay*, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. Both parties have considered the case of *Langdale v. Whitfeld* (2), before Vice-Chancellor *Wood*, as an authority in their favour. I am disposed to concur with Mr.

(1) Page 59.

(2) 4 K. & J. 426.

*Kekewich* in thinking that it is a decision in his favour, not as regards the particular facts of the case, but as regards the principle which is enunciated in it. I entirely agree with what the Vice-Chancellor there stated (1). "The authorities have clearly settled that *primâ facie*, and in the absence of anything in the will to indicate a different intention, the word 'moneys' will be confined to ready money actually in hand. A different intention may be gathered from the words of the will, and where that is the case effect will be given to it." He then went on to consider the particular circumstances of that case, and, having regard to them, he came to the conclusion that the word "moneys" in the codicil comprised not only money in hand, but all moneys due to the testator whether upon security or otherwise.

What do we find here to induce us to give to the word "moneys" in this codicil a different meaning to that which it would ordinarily have in the absence of any indication of such intention? The only argument I have heard which appears to be supported apparently by authority is that which Mr. *Pearson* rested upon, the fact that where you have a clear direction to pay funeral and testamentary expenses followed by a gift of all moneys, in that case it has been held that the word "moneys" is equivalent to personal estate. But that is not the case here. In the same document which provides for the payment of debts, funeral and testamentary expenses, we find an actual gift of residue in the terms commonly used to express a gift of residue, and therefore it is clear that the testator knew what words to use when he intended a gift of residue. We find, then, a clear gift of the residue contained in the will, and no indication of an intention to revoke it. I am, therefore, of opinion that the gift in the codicil is only a specific gift of the testator's money.

BRAMWELL, L.J. :—

I am of the same opinion. The cases as cited by Mr. *Pearson* shew that under the word "money" things may pass which are not properly so called. It seems to me that the way in which the conclusion was arrived at in those cases was this: If a will directs various payments to be made which must be paid out of the whole

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(1) 4 K. & J. 432.

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personal estate, a gift of the money which remains is then held to be a residuary clause. But this does not apply where there is a residuary clause already. Mr. *Pearson's* argument is this, not that we are to interpret this as a residuary clause, because there is none, but we are to construe the codicil as revoking the residuary clause in the will. Now that can only be done by express words, or because the two dispositions are inconsistent. The proper way to try this is to read them together. The testator (taking them together) gives all the residue of his personal estate whatsoever, except the moneys that may be left after his decease, to his daughter *Jane Williams*. What is there incongruous in that? I think, therefore, that the gift in the codicil must be held to be only a gift of money.

Solicitors: *Gregory, Rowcliffes, & Rawle; Fallows & Brown; John Cann.*

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V.-C. H.  
Dec. 9, 15.

### *In re* ORR EWING'S TRADE-MARKS.

*Trade-Mark—Registration—Committee of Experts—Distinction from other Trade-Marks—38 & 39 Vict. c. 91, s. 10—Trade-Marks Rules, 1876, rr. 58, 59, 62.* *WALSH 447*

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May 6, 7;  
June 7.

When a label for cotton goods, which had been used as a trade-mark before the passing of the *Trade Marks Registration Act*, 1875, has been placed by the Committee of Experts, appointed under the 59th Rule of the Rules for Registration of Trade-Marks, in the second class, as not being a trade-mark as defined by the Act, the decision of the Committee is, in general, final; and a Judge of the Chancery Division ought not to order the registration of such label except under special circumstances; as, for instance, that the Committee have proceeded on a wrong principle.

The decision of *Hall, V.C.*, reversed.

*1166 D. 257-4*  
*WALSH 571-5*  
*1166 D. 174*  
*1366 D. 430*  
*442*  
*1466 D. 13*  
Statement.  
THIS was an application on behalf of Messrs *Orr Ewing & Co.*, of Glasgow, for a declaration that certain marks were trade-marks within the Trade Marks Registration Acts, 1875 and 1876, and that their application for the registration of these trade-marks might be proceeded with accordingly.

Messrs. *Orr Ewing & Co.* sought to be registered as the proprietors of certain trade-marks on cotton goods which had been in

*See also Orr Ewing & Co. v. Johnston & Co. 1366 D. 430*



use by them for Turkey-red yarns for several years before the passing of the *Trade Marks Registration Act*, 1875. The Committee of Experts, appointed under Rule 59 of 1876, placed four of these trade-marks in the second class, namely, those numbered 1775, 1776, 1777, and 1778.

By the *Trade Marks Registration Act*, 1875 (38 & 39 Vict. c. 91), s. 1, a register of trade-marks, as defined by the Act, and of the proprietors thereof, was established, and it was enacted that "from and after the 1st of July, 1876, a person shall not be entitled to institute any proceeding to prevent the infringement of any trade-mark, as defined by the Act, until and unless such trade-mark is registered in pursuance of the Act."

The 7th section gave power to the Lord Chancellor to make rules as to the registry of trade-marks and the classification of goods for the purposes of the Act, and as to the registration of proprietors; and such rules, after being laid before Parliament, were to have the same validity as if they had been enacted by Parliament.

The 10th section was as follows: "For the purposes of this Act: a trade-mark consists of one or more of the following essential particulars; that is to say, a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or a written signature, or copy of a written signature, of an individual or firm; or a distinctive device, mark, heading, label, or ticket, and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures; also any special and distinctive word or words, or combination of figures or letters, used as a trade-mark before the passing of this Act may be registered as such under this Act."

By the *Trade Marks Registration Act*, 1876 (39 & 40 Vict. c. 33), s. 1, the clause of the 1st section of the Act of 1875 stated above was repealed, and it was enacted that, "From and after the 1st of July, 1877, a person shall not be entitled to institute any proceedings to prevent or to recover damages for the infringement of any trade-mark, as defined by the principal Act, until and unless such trade-mark is registered in pursuance of that Act, or until and unless, with respect to any device, mark, name, combination of words, or other matter or thing in use as a trade-mark before the

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passing of the principal Act, registration thereof as a trade-mark under the principal Act shall have been refused as hereinafter is mentioned."

Sect. 2 provided that, "When an application by any person to register as a trade-mark a device, mark, name, word, combination of words, or other matter or thing proposed for registration as a trade-mark which has been in use as a trade-mark before the passing of the recited Act, has been refused, it shall be the duty of the registrar, on request and on payment of the prescribed fee, to give to the applicant a certificate of such refusal, and a certificate so granted shall be conclusive evidence of such refusal."

The following Rules made under the Trade Marks Registration Acts, 1875 and 1876, were specially referred to in the course of the argument:—

Rule 57 provides for the establishment of an office for exhibiting trade-marks of cotton goods at *Manchester*.

Rule 58. "Every person who at the date of the passing of the Act used any cotton mark shall, on or before the 1st of December, 1876, send to the *Manchester* office three representations of such cotton mark in such form and with such a description as may be from time to time required by the Commissioners of Patents."

Rule 59. "A committee of persons versed in the usages of the cotton trade shall be appointed by the Commissioners of Patents, consisting of such number of persons as may from time to time be determined by them, and it shall be the duty of such committee on or before a time to be named by the Commissioners of Patents to divide the cotton marks, representations of which have been so sent in to the *Manchester* office, into two classes; the first class consisting of such of the said cotton marks as are in the opinion of the committee trade-marks within the meaning of the Act; and the second class consisting of such of the said cotton marks as are not in the opinion of the committee trade-marks within the meaning of the Act."

Rule 62. "Any proprietor of a cotton mark not specified in the second class in such list may apply to be registered as proprietor of such cotton mark in manner and subject to the conditions in which he may apply to be registered as proprietor of any other trade-mark, but it shall not be lawful for the Registrar to register

any person as proprietor of any cotton mark in the second class of the aforesaid list except in pursuance of an order of the Court."

Rule 63. "A cotton mark shall not be registered except in manner and subject to the conditions prescribed by these rules with respect to the registry of cotton marks."

Rule 68. "The Registrar in the course of his powers, duties, and discretion under the Act and these rules shall be subject to the superintendence of the Commissioners of Patents, and shall conform in every case to any instructions, directions, orders, or rules, general or special, that may be issued, given, or made by such Commissioners or any one of them; and he shall in all cases of doubt be entitled to refer to the said Commissioners or any of them for instructions."

The marks proposed for registration by Messrs. *Orr Ewing* were triangular labels in green and gold, each bearing an inscription upon a curtain with combinations of a crown and elephant, a demi-lion and elephants, a crown and lions, and a demi-lion and lions. They are more fully described in the affidavit of Mr. *Fry*, the keeper of the *Manchester* Branch of the Trade Marks Registry as follows:

"The said Committee placed the marks 1775, 1776, 1777, and 1778, sent by the above-named applicants, in the second class in accordance with the instructions of the Commissioners of Patents. Such instructions are contained in a letter under the hand of the Registrar of Trade Marks addressed to the president of the *Manchester* Chamber of Commerce, and the chairman of the Committee of Experts, dated the 4th of April, 1877, and the parts of it material to the present case are as follows: '(1) That in dealing under Rule 59 with cotton marks applied for in classes 23, 24, and 25, this committee should only act upon the evidence before them. (2) That in all cases where more than three persons apply for the registration of the same mark for the same description of goods, such mark must be considered as a trade-mark not within the meaning of the Act, and consequently be placed with marks belonging to the second class under Rule 59.' These four marks Nos. 1775, 1776, 1777, and 1778, were placed by the said committee in the second class in pursuance of this direction, for more than three persons had applied for registration of marks

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which the Committee of Experts consider to be substantially the same marks for the same description of goods. I have examined the marks sent in by the applicants for registration. Mark No. 1775, consists of a device comprising a crown and elephants; mark No. 1776, consists of a demi-lion and elephants; mark No. 1777, consists of a crown and lions; mark 1778, of a demi-lion and lions; and I have searched the books of the second class of the marks as divided by the committee and I find in this class 31 crowns used by different firms, 52 elephants used by 30 different firms, and 137 lions and demi-lions used by 64 different firms; and the Committee of Experts have come to the conclusion that such marks do not possess a distinctive character so as to enable them to be treated as marks within the meaning of the Act and the directions of the Commissioners of Patents."

Dickinson, Q.C., and H. A. Giffard, appeared for Messrs. *Orr Ewing & Co.*

Sir *H. Giffard, S.G., and Rigby*, for the Registrar of Trade Marks.

Judgment,
 V.C.H.

HALL, V.C., after reading the affidavit of Mr. *Fry* set forth above, continued:—

Having seen the devices or labels which the applicants seek to have registered, and also having seen other devices or labels shewn to me as being sufficient specimens of the other trade-marks referred to in the affidavit, the claimants of which have asked to have registered, and also having seen other devices which the applicants have been allowed to register, I consider that the labels which have been placed by the experts in the second class are "distinctive devices or labels," and should have been placed in the first class. It is not sufficient, in my opinion, to prevent them being so placed that parts of them consist of lions or elephants or crowns, which being, or being contained in, the devices of other applicants the committee have dealt with by putting the applicants in the second class. Lions, elephants, and crowns may have been made the subject of applications singly or as parts of devices. I consider that in each case the device or

label, registration of which is applied for, must be looked at as a whole, and that if it appears to be such as in the ordinary course of business would be distinguished from other devices or labels, it should be registered. I think the devices or labels in question so being looked at would be so distinguished. In this I am confirmed by the affidavits which have been filed in support of the application. I think that the Registrar should proceed with the applications as if the Committee of Experts had placed all the applicant's labels or devices which are the subject of the present application in the first class. If and when the applicants would have been entitled to register had the Committee of Experts so done an order for the Registrar to register the devices in question may be drawn up in accordance with the 62nd rule.

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From this decision the Registrar of Trade-Marks appealed. The appeal was heard on the 6th of May, 1878.

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Some further evidence was adduced before the Court of Appeal as to the custom of the cotton trade with respect to trade-marks.

Sir *H. Giffard*, S.G., and *Rigby*, for the Appellant:—

Argument.

The intention of the Legislature was that the decision of the Committee of Experts should be final in the absence of some evident miscarriage. It was felt that in the peculiar circumstances of the cotton trade it was almost impossible for the Court to form an intelligent opinion, otherwise the committee would not have been appointed.

The refusal of registration does not take away the common law right of the Respondents to bring their action for violation of their trade-mark. It only deprives them of the statutory remedies under the Act.

Dickinson, Q.C., and *H. A. Giffard*, for the Respondents:—

The labels in question have been in use by the Respondents for many years, and no one has attempted to invade their rights in them except a firm against which they are now bringing an action in another branch of the Court. There is sufficient distinction in the trade-marks to be recognised as their special property by other persons engaged in the cotton trade. The fact of their

C. A. using common animals, like lions and elephants, does not make
 1878 the trade-marks the less distinctive, provided the combination
In re and the general design of the label is peculiar: *In re Hyde's*
 ORR EWING'S *Trade Mark* (1); *In re Barrow's Trade Mark* (2). It was never
 TRADE- intended that the decision of the Committee of Experts should be
 MARES, final. The Court has all the materials before it for judging of
 Argument, the admissibility of the trade-marks, and ought to decide the
 question.

Rigby, in reply.

Judgment, C. A. June 7. BAGGALLAY, L.J.:—
 Baggallay, L.J.

This appeal arises out of an application made by Messrs. *Orr Ewing & Co.* to the Registrar of Trade-Marks at *Manchester* to have registered as trade-marks, under the provisions of the *Trade Marks Registration Act*, 1875, certain marks which had been in use by them previously to the passing of that Act in respect of cotton goods.

It will be convenient, before directing attention to the circumstances under which this appeal has been presented, to consider the general scope and effect of the Trade Marks Registration Acts of 1875 and 1876, and of the rules made by the Lord Chancellor under the powers contained in such Acts.

The 1st section of the Act of 1875, after enacting that a register of trade-marks, as defined by the Act, shall be established under the superintendence of the Commissioners of Patents—that is, of the Lord Chancellor, the Master of the Rolls, the Attorney-General, and the Solicitor-General for the time being—is continued in the following terms:—[His Lordship read the clause of the section set forth above.] This portion of the section was repealed and another provision enacted in its place by the Act of 1876. The distinction between the two provisions will be considered presently, but it may be here noted that the provisions of the Registration Acts have reference only to trade-marks as defined by the Act of 1875, conferring certain advantages on

proprietors who register, and imposing restrictions under certain circumstances on the rights of those who, being entitled to register, fail to do so.

The 2nd, 3rd, and 4th sections have reference to the privileges and advantages accruing to the proprietors of trade-marks by reason of registration, and need not be more particularly referred to. The 5th provides for an appeal to the Court—that is (as determined by one of the rules made under the Act), the Chancery Division of the High Court of Justice—in the event (amongst others) of the Registrar refusing to register as the proprietor of a trade-mark the name of any person for the time being entitled to the exclusive use of such trade-mark.

The 6th section provides that the Registrar shall not, without the special leave of the Court, register in respect of the same goods or classes of goods a trade-mark identical with one which has been already registered with respect to such goods or classes of goods, or one so nearly resembling a trade-mark already on the register with respect to such goods or classes of goods as to be calculated to deceive.

The 7th section provides that the Lord Chancellor may from time to time, with the assent of the Treasury as to fees, make, and when made alter, annul, or vary such general rules as to the registry of trade-marks, and as to the classification of goods for the purpose of the Act, and generally for the purpose of carrying the Act into effect, as he may deem expedient; but such rules are subject to disallowance by either House of Parliament.

The 9th section contains certain provisions applicable only to *Sheffield* goods and the *Cutlers' Company*. The 10th section contains a definition of a trade-mark in the following terms:—[His Lordship read the section.]

Such being the provisions of the Act of 1875, it was found impossible, by reason of the number of trade-marks and of the difficulties attending the registration of trade-marks in relation to textile fabrics, to complete the registration of existing trade-marks before the 1st of July, 1876, and for the purpose of prolonging the time for the completion of such registration, and of amending the Act of 1875 as presently mentioned, the Act of 1876 was passed. [His Lordship read the 1st and 2nd sections

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C. A. of the Act of 1876, and continued :—] It is important to note
 1878 the alterations introduced by the Act of 1876 affecting the
In re registration of trade-marks as enacted by the Act of 1875.
 ORR EWING'S The Act of 1875 made no distinction between trade-marks
 TRADE- which had, and those which had not, been in use prior to the date
 MARKS. of the passing of that Act ; in respect of all alike the proprietors
 Judgment, C. A. were deprived, after the 1st of July, 1876, of the right of instituting proceedings to prevent infringements unless and until their trade-marks were registered in manner provided by that Act. By the Act of 1876 this period was extended from the 1st of July, 1876, to the 1st of July, 1877, and the restriction upon instituting proceedings was extended to proceedings to recover damages for infringement ; but this important exception was introduced, viz., that when an application to register a trade-mark which had been in use previously to the date of the passing of the Act of 1875 has been refused, the proprietor is left at liberty after such refusal to institute proceedings either to prevent or to obtain damages for an infringement, the Registrar being bound to give a certificate of refusal when required, and the certificate, when given, being conclusive evidence of the refusal.

In the month of August, 1876, the Lord Chancellor, under the powers conferred upon him by the Act of 1875, annulled all former rules made by him, and made divers rules numbered from 1 to 72, both inclusive, which are now of full force and effect.

For the purpose of the present appeal, it is unnecessary to refer to more than a few of these rules. The 1st rule taken in connection with the first schedule provides that all goods shall be divided into fifty classes ; of these, class 23 consists of cotton yarns and thread ; class 24 of cotton piece goods of all kinds ; and class 25 of all cotton goods not included in classes 23, 24, or 38 ; class 38 consisting of articles of clothing only. The question involved in this appeal has reference to goods within these classes. Rules 46 to 56, both inclusive, contain provisions applicable to *Sheffield* goods and the *Cutlers' Company* only, and Rules 57 to 63, both inclusive, have application to cotton goods. To these I must now direct attention.

[His Lordship then read Rules 57, 58, 59, 62, 63, and 68, which are set forth above, and continued :—]

Under Rule 59 a committee of persons versed in the usages of the cotton trade was appointed by the Commissioners of Patents, which committee consisted in the first instance of the president and vice-president of the Chamber of Commerce at *Manchester*, and of ten other gentlemen. The number of members in such committee, which is commonly called the Committee of Experts, was subsequently increased, and has from time to time varied. The number of members is at present about twenty.

Such being the general scope and effect of the Registration Acts, and of the rules made under them, I proceed to consider the circumstances under which this appeal has been presented. On the 3rd of February, 1876, Messrs. *Orr Ewing & Co.*, who are merchants at *Glasgow*, applied, as has been already mentioned, to the Registrar of Trade-Marks at *Manchester*, to register as trade-marks certain marks which they had been in the habit of using, previously to the passing of the Act, in respect of cotton goods. The Committee of Experts being of opinion that four of such cotton marks, being those numbered 1775, 1776, 1777, and 1778, respectively, were not trade-marks within the meaning of the Act, placed them in the second of the two classes into which it was their duty to divide all cotton marks which had been used previously to the date of the passing of the Act.

As Rule 62 prohibited the Registrar from registering any cotton marks which had been placed in the second class, except in pursuance of an order of the Chancery Division of the High Court of Justice, Messrs. *Orr Ewing & Co.* applied to Vice-Chancellor *Hall* for a declaration that the said cotton marks were trade-marks within the meaning of the Trade Marks Registration Acts, and for an order that the application which they had made to the Registrar for the registration of such cotton marks should be proceeded with, and the Vice-Chancellor, on the 15th of December, 1877, made a declaration and order in accordance with such application. From such order of the 15th of December, 1877, the present appeal is brought.

Now the rules to which reference has been made, not having been annulled or varied, are of the same force and effect as if they had been incorporated in the Act of 1875, and reading the Act as if they had been so incorporated, it appears to me that it was the

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object of the Legislature to modify the general provisions of the Act as regards the mode of obtaining registration of trade-marks in the two cases of *Sheffield* goods and cotton goods, the modification as regards the former of these cases having been effected partly by the provisions in the Act and partly by the rules, and as regards the latter by the rules alone, and to require in all cases of applications to register marks in respect of cotton goods, at any rate as regards all such marks as had been in use previously to August, 1875, the date of the passing of the Act of 1875, that the opinion of the Committee should be taken as to whether they were or were not trade-marks within the meaning of the Act, and that such opinion should be acted upon unless some special circumstances should be shewn which would justify a departure from it. It would appear from the judgment of the Vice-Chancellor that he formed his opinion in favour of the Respondents from an examination of the marks sent in for registration and a comparison of them with certain other marks, some of which were placed in class 1 and others in class 2. But was it intended by the Legislature that the Court to which application might be made should make such personal examination or form an opinion upon it, unless on some special case made out? I think not. It appears to me that the object of the Legislature was to make the Committee judges of the character of the marks, whether they were trade-marks or not within the definition contained in the Act, subject, of course, to an appeal under such circumstances as the Court to which the appeal should be made should deem sufficiently special to warrant such a step being taken. It does not appear to be necessary to suggest instances of what might be regarded as special circumstances sufficient for such a purpose, but in the view which I take of the scope and purport of the Acts of Parliament a mere difference of opinion on the part of the Judge from that of the Committee as to whether the marks were or were not trade-marks is not a circumstance sufficiently special to authorize a reversal of the Committee's decision. The members of such a committee must be presumably more competent to form an opinion upon the subject-matters submitted to them than any Judge of the Chancery Division or of the Court of Appeal, and it is difficult to suggest any other reason

for their appointment than such presumed superior competency, It should, however, be mentioned that we have had evidence before us which was not before the Vice-Chancellor, and in particular an affidavit made by Mr. *Potter*, the Vice-President of the Committee, in which, amongst other things, he has pointed out the peculiarity of the cotton trade, not only in respect of the use of trade-marks generally, but of the peculiar character of trade-marks adopted by manufacturers in foreign as well as home markets. It is unnecessary to go through the details of that affidavit; it is sufficient for us to say that having had the same advantage of seeing the exhibits which the Vice-Chancellor had, and having had the further advantage of considering the affidavit to which I have just referred, I should be prepared to hold, if it were necessary to do so for the decision of this case, that the marks in question are not trade-marks within the meaning of the Act, and were properly placed by the Committee in the second class; but I prefer to rest my decision upon the ground that no case has been made out for interfering with the conclusion at which the Committee have arrived upon a matter which it was within their special province to consider, and upon which they must be presumed to have formed an impartial opinion. A reversal of the order of the Vice-Chancellor and a refusal to interfere with the decision of the Committee placing the Respondents' cotton marks in the second class will not deprive the Respondents of any right of taking proceedings to protect their marks which they would have had if the Trade Marks Registration Acts had not been passed.

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MARKS.Judgment, C. A.
Baggallay, L.J.

JAMES, L.J.:—

James, L.J.

I am of opinion that the Committee at *Manchester* was in the nature of a tribunal of commerce or experts, and that the High Court in dealing with a case dealt with by them should not interfere with their decision unless satisfied that they have proceeded on some wrong principle, or in some improper manner, of which I see no proof. I should not have been disposed to take or act on that view if it had not been that the report of the Registrar has not deprived the Appellants of any legal or equitable right they had prior to the Act, but merely does not give them the special benefit of the Act.

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480.

C. A. A case which we have had since the appeal was argued, relative
 1878 to trade-marks at *Manchester*, has gone far to satisfy me of the
In re good sense of the Committee in dealing as they have done with
 ORR EWING'S the registration of the trade-mark.
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BRAMWELL, L.J., concurred.

Solicitors for Appellant: *Hare & Fell*.

Solicitors for Defendants: *Phelps, Sidgwick, & Biddle*.

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In re WEST JEWELL TIN MINING COMPANY.

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LITTLE'S CASE.

June 24.

Practice—Notice of Appeal—Rules of Court, 1875, Order LVIII., rr. 2, 4.

A person against whom an order in a winding-up had been made for payment of money to the official liquidator served on the official liquidator a notice: "Take notice that it is the intention of *J. L.* to prosecute an appeal from the order made in this matter by His Honour the Vice-Warden of the Stannaries on the 29th of May, 1878, whereby the said *J. L.* was ordered," &c. :—

Held, that this notice was sufficient, and the appeal was ordered to be set down.

Statement.

ON the 29th of May, 1878, an order was made by the Vice-Warden of the Stannaries that *John Little* should within eight days after service of the order pay to the official liquidator of the *West Jewell Tin Mining Company, Limited*, £750, with £11 13s. for costs.

On the 15th of June *Little* delivered to the official liquidator and to the Registrar of the Vice-Warden's Court a notice in the following form :—

"Take notice that it is the intention of *John Little*, of &c., to prosecute an appeal to the Court of Appeal from the whole of the order absolute made in this matter by His Honour the Vice-Warden of the Stannaries on 29th May, 1878, whereby the said *John Little* was ordered within eight days after service thereof

on him to pay to the official liquidator of the said company the sum of £750, and £11 13s. for costs." C. A.

No other notice of appeal was given.

The Registrar, on being applied to to set down the appeal, declined to set it down on the ground that no notice of appeal had been given, but only a notice of an intention to appeal.

The time for appealing having expired, *Little*, by special leave, moved before the Court of Appeal for leave to appeal, or that he might be at liberty to amend the notice of appeal already given, and to set the same down to be heard with the appeals already pending in the same matter.

Woodroffe, for the motion.

C. H. Turner, for the official liquidator.

THE COURT (*James, Brett, and Cotton*, L.JJ.) held that the notice of appeal, though informal, was sufficient, and directed the Registrar to set down the appeal, the costs of the motion to be costs in the appeal.

Solicitors: *E. Kimber*; *E. Beall*.

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Ex parte ADAMSON. *In re* COLLIE.

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Proof in Bankruptcy—Partners—Debt incurred by Fraud—Joint and Several Liability—Right of Election to prove against Joint or Separate Estates—Time when Election must be made—Estoppel by Receipt of Dividend—Refunding Dividend—Interest—Bankruptcy Act, 1869, ss. 4, 31, 49.

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May 23, 30;
June 6;
July 4.

Held, by *James* and *Baggallay*, L.JJ. (*Bramwell*, L.J., dissenting), that where a partnership debt has been incurred by means of a fraud on the part of the partners the defrauded creditor has a right to prove at his election against either the joint estate of the firm or the separate estates of the partners, even though no judgment has been recovered by him against the partners:

Held, by *Bramwell*, L.J., that in such a case, judgment not having been recovered against the partners, there is no right to prove against the separate estates.

When a creditor has such a right of election he does not lose it merely

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because he has proved and received dividend. But he may change his election on refunding the dividend which he has received, with interest at 4 per cent., though he cannot disturb any dividend already paid.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy, rejecting a proof for £120,197 10s. 11d., tendered by *John Adamson* against each of the separate estates of *Alexander* and *William Collie*, partners, who were adjudicated bankrupts on the 19th of August, 1875.

A. and W. Collie were merchants trading in *London* and at *Manchester*, under the firm of *Alexander Collie & Co.* In the year 1872 *Adamson* arranged with the firm to enter with them into speculations in the purchase and sale of cotton on joint account, for which purpose he was to supply the requisite capital by accepting bills of exchange drawn upon him by them. *Adamson* was to receive half the net proceeds of the ventures. This arrangement was carried out, and he from time to time accepted bills to a large amount, which were discounted by the firm. The bills were renewed from time to time. The firm from time to time wrote to *Adamson*, sending him accounts of purchases and sales of cotton on the joint account. On the 15th of June, 1875, the firm stopped payment, and immediately after this *Adamson* discovered that the alleged purchases of cotton on the joint account were almost entirely, if not entirely, fictitious, and that no cotton, or at any rate a very small quantity, had ever been purchased on that account, and *Alexander Collie* confessed that he had deceived him. After the stoppage of the firm *Adamson* was compelled to pay his acceptances when they matured, and his proof of £120,197 10s. 11d. was for the moneys which he had thus paid. In July, 1875, *Adamson* commenced some legal proceedings against the bankrupts in the *United States of America*, with the view of attaching a judgment debt, which had been recovered by them there. Those proceedings were abandoned in November, 1875, and *Adamson*, on the 22nd of March, 1876, notified to the trustee in the bankruptcy that he intended to prove against the joint estate of the bankrupts for the amount of the acceptances, and his proof was on the 1st of April, 1876, provisionally admitted by the trustee at £115,000. The trustee had on the 16th of March, 1876, issued the proper statutory notices of his intention to declare a

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14CLD454
15CLD183

first dividend on the joint estate of the bankrupts, and on each of their separate estates. A first dividend of 9*d.* in the pound on the joint estate was on the 17th of May, 1876, paid by the trustee to *Adamson* in respect of the £115,000. On the 5th of December, 1876, *Adamson* gave the trustee notice of his intention to claim to rank as a creditor against the separate estates of the bankrupts in respect of the acceptances, and on the 30th of April, 1877, he tendered a proof for £120,197 10*s.* 11*d.* against each of the separate estates. The claim was described in *Adamson's* affidavit as being "in respect of moneys of mine, received by the firm of *Alexander Collie & Co.* on account of a certain venture in cotton in which I was engaged jointly with them, and misapplied by them in breach of the trust imposed upon them in respect of such joint venture." The trustee rejected the proofs, and *Adamson* applied to the Court to order them to be admitted, asking at the same time that he might be at liberty to withdraw his proof against the joint estate, and offering to refund or give credit for all dividends received by him upon his proof against the joint estate.

Adamson deposed that his proof against the joint estate was made without any intention of electing between the separate estates and the joint estate, in ignorance of his right so to elect, and also in ignorance of the relative values of the joint and separate estates. He said that in November, 1876, he read in a *Glasgow* newspaper a report of the hearing of an application by another creditor of the bankrupt, who, under similar circumstances to his own, was allowed to prove against the separate estates, and that previously to reading that report he was not aware that he had any right to elect between the joint estate and the separate estates. After reading that report he immediately communicated with his solicitors on the subject, and the notice of the 5th of December, 1876, was sent to the trustee. Until December, 1876, he was unaware that it would make any difference to him whether he proved against the joint or against the separate estates.

It appeared probable that a very much larger dividend would be paid on the separate estates than on the joint estates.

The Registrar affirmed the decision of the trustee, rejecting the proofs. He held that *Adamson* would have been originally entitled

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to elect whether he would prove against the joint estate or against the separate estates, but that having made his proof he could not change it after the receipt of a dividend. His Honour dismissed the application with costs.

Adamson appealed.

Argument.

Southgate, Q.C., *Joseph Brown*, Q.C., *De Gex*, Q.C., and *G. W. Lawrance*, for the Appellant:—

Ex parte Bolton (1) shews that the receipt of dividend does not estop the Appellant from now proving against the separate estates, as he proved against the joint estate in ignorance of his rights. The Appellant's debt having been incurred by the fraud of the partners their liability in equity is joint and several, and, that being so, *Ex parte Rowlandson* (2) shews that the Appellant had an election to prove against either the joint estate or the separate estates. No one can be prejudiced by his changing his election now, if he refunds the dividend which he has received, for of course he cannot disturb any dividend already paid on the separate estates. No one can be said to have changed his position in consequence of what the Appellant has done. It cannot be said that he has elected, for he made his proof in ignorance of his legal rights, in ignorance of the fact that there were separate estates, and in ignorance of their value compared with that of the joint estate, nor had he full knowledge of the facts relating to the fraud. In *Ex parte Downes* (3), which will be relied on against us, a mortgagee had elected to abandon his security, and afterwards sought to be restored to his original position. That is quite different from the present case, for the property might have been realized by the assignee and distributed.

[JAMES, L.J.:—You say that the change you ask for will be no *injuria* to the other creditors, though it may cause *damnum* to them.

BRAMWELL, L.J.:—As a general rule money paid under a mistake of law cannot be recovered.

JAMES, L.J., referred to *Ex parte James* (4).]

(1) Buck, 7.

(2) 3 P. Wms. 405.

(3) 1 Rose, 96.

(4) Law Rep. 9 Ch. 609.

In *Ex parte Liddel* (1) Lord *Eldon* came to the conclusion upon the facts that there had been a deliberate election. Lord *Eldon* explains the case in that way: *Ex parte Bolton* (2); *Ex parte Adam* (3). *Ex parte Bolton* (4) is on all fours with the present case. *Ex parte Husbands* (5) is no doubt against us, but *Ex parte Bolton* was not cited there, and, moreover, the decision was reversed on appeal (6). In *Ex parte Dixon* (7) it was clear that there had been a deliberate election, and, moreover, the order asked for was afterwards consented to by the assignees. In *Ex parte Law* (8) it was held that receipt of dividend did not make a concluded election. The doctrine of election cannot be applied as against a man who has acted without a knowledge of all the facts, or who, before the fund is distributed, changes his mind.

[JAMES, L.J.:—Has the doctrine that money paid under a mistake of law cannot be recovered, ever been applied to a case of election?]

Spread v. Morgan (9) shews that knowledge of the doctrine of election is not to be imputed as a matter of legal obligation. In order to bind a party by election, it must be shewn that with knowledge of all the facts and of the obligation to elect he deliberately intended to elect: *Edwards v. Morgan* (10); *Pusey v. Desbouvrie* (11); *Dillon v. Parker* (12); *Kidney v. Coussmaker* (13); *Kelly v. Solari* (14); *Townsend v. Crowdy* (15); *Wilson v. Thornbury* (16); *Story's Equity* (17). In the present case it is said that the Appellant must be taken to have known that he had a right, which the trustee now says that he had not.

[JAMES, L.J.:—Is it not the duty of a trustee to inform his *cestui que trust* of his legal rights before he takes a release from him?]

A Court of Equity has power to relieve against mistakes of law

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| (1) 2 Rose, 34. | (9) 11 H. L. C. 588. |
| (2) Buck, 10, note (a). | (10) M'Cl. 541. |
| (3) 2 Rose, 36. | (11) 3 P. Wms. 315. |
| (4) Buck, 7. | (12) 1 Sw. 359, 381, n. |
| (5) 5 Madd. 419. | (13) 12 Ves. 136. |
| (6) 2 Gly. & J. 4. | (14) 9 M. & W. 54. |
| (7) 2 M. D. & D. 312. | (15) 8 C. B. (N.S.) 477. |
| (8) Mont. & Ch. 111; 3 Deac. 541. | (16) Law Rep. 10 Ch. 239. |
| (17) 11th Ed. vol. ii. pp. 375, 376. | |

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as well as of fact: *Stone v. Godfrey* (1); *Cooper v. Phibbs* (2); *Earl Beauchamp v. Winn* (3). But in the present case the mistake was not as to the law, but as to a very technical rule of the Court of Bankruptcy: *Ex parte Bevan* (4).

That there was originally the right of election which we assert is clear for the fraud created a several liability on the part of the partners, who were parties to it, in addition to their joint liability in respect of the debt. In equity fraud always creates a joint and several liability to replace the money obtained by the fraud, and in bankruptcy this gives a right to prove either against the joint estate or the separate estates of the partners. And a partner who is ignorant of the fraud committed by the partnership is liable: *Brydges v. Branfill* (5); *Lindley on Partnership* (6); *Story on Partnership* (7). The joint and several liability in the case of fraud is shewn by *New Sombrero Phosphate Company v. Erlanger* (8); *Lovell v. Hicks* (9); *Sadler v. Lee* (10).

[BRAMWELL, L.J.:—In bankruptcy you prove for a debt, not for a fraud.

BAGGALLAY, L.J., referred to the *Bankruptcy Act*, 1869, s. 31].

The bankrupt is not released by his order of discharge from debts incurred by fraud: sect. 49.

[JAMES, L.J., referred to *Ex parte Unity, &c., Banking Association* (11).]

That we have the right of proof is also shewn by *Ex parte Turner* (12); *Rapp v. Latham* (13), a case very like the present case: *Robson on Bankruptcy* (14). Where money has been obtained by fraud, the person defrauded has an election at law to waive the tort and sue for the money; but though the action for tort is waived, the tort is not waived altogether. An innocent partner is liable for the fraud of his co-partner: *Barwick v. English Joint Stock Bank* (15); *Mackay v. Commercial Bank of*

(1) 5 D. M. & G. 76.

(2) Law Rep. 2 H. L. 149.

(3) Ibid. 6 H. L. 223.

(4) 10 Ves. 107, 109.

(5) 12 Sim. 369.

(6) 4th Ed. p. 1173.

(7) 4th Ed. p. 283.

(8) 5 Ch. D. 73.

(9) 2 Y. & C. Ex. 472, 487.

(10) 6 Beav. 324.

(11) 3 De G. & J. 63.

(12) Mont. & Mac. 255.

(13) 2 B. & A. 795.

(14) 3rd Ed. p. 666.

(15) Law Rep. 2 Ex. 259.

New Brunswick (1); *Swire v. Francis* (2). At law the liability for a tort was joint and several.

[BRAMWELL, L.J.:—There could not be a plea in abatement.]

But judgment against one of several joint tort-feasors was a bar to an action against another: *Brinsmead v. Harrison* (3). The Plaintiff may recover separately against each, but he can have but one satisfaction: *Livingstone v. Bishop* (4). The evidence shews that both the partners were in fact cognizant of the fraud.

[JAMES, L.J.:—*Primâ facie* the false representation was made by the firm. It is for your opponents to shew that either of the partners was innocent.]

Winslow, Q.C., and *J. Linklater*, for the trustee:—

If this proof is admitted against the separate estates there will be no surplus for the joint creditors; if it is not admitted there will be a surplus. There has been a complete election by the Appellant within the rule in bankruptcy. It is very important that a creditor who has a right to elect should elect before he takes a dividend. The cases shew that the rule formerly was that he could not alter his election after the receipt of dividend, and it is more important now than it was formerly. Formerly the assignee was bound to take notice only of debts which were proved, and might divide the assets among those creditors who had proved. This was altered by the *Bankruptcy Act*, 1861, and now the trustee must reserve funds to answer provable debts which are mentioned in the debtor's statement of affairs, even though they have not been proved: *Bankruptcy Act*, 1869, ss. 41-43; Bankruptcy Rules, 1870, rule 312. In the present case the trustee may have reserved money for other creditors on the separate estates on the footing of the Appellant having elected to prove against the joint estate. The rule laid down in *Cooke's Bankrupt Laws* (5) is that the election must be made before the receipt of a dividend. The same rule is laid down in *Lindley on Partnership* (6). *Ex parte Bentley* (7) is an authority to this effect. *Ex*

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(1) Law Rep. 5 P. C. 394, 411.

(2) 3 App. Cas. 106.

(3) Law Rep. 7 C. P. 547.

(4) 1 Joh. (Supreme Court New York) 289.

(5) Vol. i. p. 275.

(6) 4th Ed. p. 1210.

(7) 2 Cox, 218.

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parte Rowlandson (1) was the first case which decided that in the case of a joint and several liability there could not be proof against both the joint estate and the separate estates, but that the creditor must make his election. In *Ex parte Bond* (2) a similar attempt was made without success. The creditor is entitled to delay his election until he knows the state of the accounts, but he must elect before the receipt of dividend. This is the rule. *Ex parte Bolton* (3) was an exception under very peculiar circumstances.

[BAGGALLAY, L.J., referred to *Ex parte Carne* (4).]

The question there was whether a surety was bound by the election of the principal creditor. *Ex parte Downes* (5) is in our favour.

[JAMES, L.J., referred to *Ex parte Capot* (6).]

Ex parte Liddel (7) is also in our favour. In *Ex parte Bevan* (8) Lord Eldon says that a proof against the joint estate implies a contract by the creditor with the other joint creditors that he and they shall share in the surplus of the separate estates. In *Ex parte Solomon* (9) it was held that a creditor who had a lien on the property of the bankrupt had, by proving his debt, voting in the choice of assignees, and signing the certificate, elected to give up his lien. *Ex parte Husbands* (10) shews that, unless there are special circumstances, the election must be made before receipt of dividend. The decision was reversed by the Lord Chancellor (11), because the dividend had only been declared, not received.

[JAMES, L.J.:—All the prejudice has taken place by the declaration of dividend. What difference is there between not taking the dividend out of the trustee's hands and repaying it to him the next day?]

In *Ex parte Law* (12) the circumstances were very special; *Ex parte Dixon* (13) is clearly in our favour; *Ex parte Davenport* (14)

(1) 3 P. Wms. 405.

(2) 1 Atk. 98.

(3) Buck, 7.

(4) Law Rep. 3 Ch. 463.

(5) 1 Rose, 96.

(6) 1 Atk. 219.

(7) 2 Rose, 34.

(8) 10 Ves. 107.

(9) 1 Gly. & J. 25.

(10) 5 Madd. 419.

(11) 2 Gly. & J. 4.

(12) Mont. & Ch. 111; 3 Dea. 541.

(13) 2 M. D. & D. 312.

(14) 1 Ibid. 313.

shews that a mistake of law is not a sufficient reason for allowing the change of election. The rules as to proof in bankruptcy are now made a part of the statute law by sect. 25 of the *Judicature Act*, 1873. The cases cited as to the general doctrine of election do not apply, and indeed in most, if not in all of them, the mistake was one of fact. The Court will not relieve against a mistake of law in a case of a mere money demand: *Rogers v. Ingham* (1).

But the Appellant never had any right to prove against the separate estates. The bankrupts acted as his bankers in the transactions. It was a simple debtor and creditor transaction. If the fraud gave him any right, it was a right of action for the misrepresentation, and damages not having been recovered, there is no right in such a case to prove in the bankruptcy: *Bankruptcy Act*, 1869, s. 31; *Ex parte Baum* (2).

[JAMES, L.J., referred to *Phosphate Sewage Company v. Hartmont* (3).]

Barwick v. English Joint Stock Bank (4) and *Mackay v. Commercial Bank of New Brunswick* (5) were actions of deceit; there could have been no right of proof in bankruptcy. The rule as to the liability of partners in respect of torts is laid down in *Lindley on Partnership* (6), and his observations shew that it is very difficult to distinguish between the liability in equity in cases of contract and in cases of tort.

[JAMES, L.J.:—In a Court of Equity the liability in a case of fraud was a joint and several one to restore the money fraudulently taken, not a liability in damages. You could not sue in equity on an ordinary partnership contract, except in the administration of the assets of a deceased partner.]

If the ordinary rule of equity that partners are jointly and severally liable for the partnership debts does not give a right of proof in bankruptcy against the separate estates, why should that right exist in a case of fraud? The provisions of sect. 31 of the *Bankruptcy Act*, 1869, that demands in the nature of unliquidated

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(1) 3 Ch. D. 351.

(2) Law Rep. 9 Ch. 673.

(3) 5 Ch. D. 394.

(4) Law Rep. 2 Ex. 259.

(5) Ibid. 5 P. C. 394.

(6) 4th Ed. 373.

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damages in cases of tort shall not be provable in bankruptcy, does not depend upon the fact that the damages are unliquidated, but upon the fact that they arise out of fraud. *Ex parte Unity, &c., Banking Association* (1) is distinguishable; in *Ex parte Turner* (2) the money was clearly in hand. *Brydges v. Branfill* (3), and all the cases of that class, depend on the principle that partners are jointly and severally liable in a Court of Equity. That is not so in bankruptcy. In the present case the money is not traced into the hands of either of the partners. In *Ex parte Poulson* (4), each partner had committed a breach of trust. In *Ex parte Geaves* (5) the bankrupt had got the money, and had made himself personally liable as a trustee. There is no right to proof against the separate estates unless a joint and several liability has previously been established in a suit in equity or in an action at law. Upon the evidence, the true conclusion is that the Appellant was a partner with the bankrupts, the three constituting one firm. A partner cannot prove against the estate of his co-partner until all the creditors have been paid in full, except in the case of a fraud which could not have been discovered: *Read v. Bailey* (6); *Ex parte Lodge* (7); *Ex parte Yonge* (8). A joint adventure constitutes a partnership *Lindley on Partnership* (9).

Southgate, in reply, as to the right of proof only:—

It is clear, on the authorities, that the liability to replace the money was joint and several in equity, and if so, it follows that there is a right in bankruptcy to prove either against the joint or the separate estates.

[JAMES, L.J., referred to *Earl of Dundonald v. Masterman* (10).]

Judgment,
James and
Baggallay, L.JJ.

July 4. JAMES, L.J., delivered the judgment of himself and Baggallay, L.J., as follows:—

There are two questions to be decided in this case. The first is,

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| (1) 3 De G. & J. 63. | (6) 3 App. Cas. 94. |
| (2) Mont. & Mac. 255. | (7) 1 Ves. 166. |
| (3) 12 Sim. 369. | (8) 3 V. & B. 31. |
| (4) De G. 79. | (9) 4th Ed. p. 55. |
| (5) 8 D. M. & G. 291. | (10) Law Rep. 7 Eq. 504. |

whether Mr. *Adamson*, the Appellant, is to be allowed, after proving against the joint estate and receiving a dividend on that proof, to prove against the separate estates, withdrawing his joint proof and returning what he has received. The Registrar was of opinion that he had originally a right to prove against either the joint estate or the separate estates at his option; but that, having proved against the former, he must be deemed to have elected between the two rights, and is bound by that election. By a rule which was established by the Courts (it is difficult to see on what principle or by what authority) a creditor having a joint legal or equitable demand against a partnership, and a several one against the members, or some of the members, of the same partnership, was not entitled to go against the joint estate and the separate estates, but was entitled to choose between them; and it was laid down in the books that the election must be made before the receipt of a dividend. But case after case has been cited to us in which creditors were permitted to alter their election, and after having gone against the one estate to go against the other. In the case before us the question is not one of election at all. It is quite clear that Mr. *Adamson* never dreamt of electing, never knew anything about electing, and never knew that he had the rights between which he is deemed and adjudged to have elected. To say that such a man had elected is to say the thing that is not, and it is no more open to a Court or a Judge to say the thing which is not than it is to other men; and the question, then, really is, not whether he had elected, but whether he is estopped from asserting one of two rights, which he says he had, by reason of his having successfully asserted the other of them. Why should he be? It is admitted (admitted, I mean, for this part of the case) that if he had never done anything he could have now made his proof against the separate estates. Then what has he done, as between him and the other creditors of those estates, to give them any right at law, or in equity, or in common sense, to interpose between him and the proof which he tenders? Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from

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doing something, by reason of what he had said or done, or omitted to say or do. In bankruptcy a creditor who does not come in and make the proof he is entitled to make runs this risk and incurs this penalty—that he cannot undo anything which has been done. The other creditors retain any dividend which has been declared, and he can only go against the assets which may chance to be remaining; so no harm is done. But the Appellant has gone against the joint estate and taken a dividend. What harm is that to the separate creditors? Of course they would be entitled to any possible surplus of the joint estate, but as the dividend is to be paid back, even that contingent and imaginary right is restored to them as fully and beneficially as if the dividend had never been taken. What harm is done to the creditors of the joint estate? They get the dividend back into their estate, and the only thing which was suggested to us was the inconvenience to the trustee of having to make a fresh distribution of these new assets. But it is the main duty of a trustee to distribute any assets which may from time to time come to his hands, and, even if he had to make a new sum in arithmetic and to send out fresh letters and fresh cheques every quarter or every month, it does not seem to be an inconvenience to be put into competition with the inconvenience which would be suffered by a creditor who is deprived of a sum of money to which he is legally, equitably, and morally entitled. If Mr. *Adamson* has the right which he asserts that he has, he has not by what he has done forfeited it.

The second question, therefore, remains to be considered, Has he that right? The counsel for the Respondent having contended that Mr. *Adamson* must be taken to have knowingly elected between two alternative rights which he must be taken to have known, next argued that he had no right of proof against the separate estates of the partners. The ground for the separate proof is this: Mr. *Adamson* was induced to accept bills of exchange for a very large amount, on the representation that they were bills, or renewals of bills, representing the purchase-money of large quantities of cotton, stated to have been purchased on the joint account of Mr. *Adamson* and the two *Collies*, and continued to be held by them on such joint account. This representation was wholly, or almost wholly, fictitious, and there is no doubt that Mr. *Adamson* was

cheated out of the acceptances which he gave, and which he had to meet when they matured. That *Alexander Collie* was guilty of the frauds there is no dispute, and, in the absence of evidence to explain his part of the transaction, it is impossible not to hold that *William Collie*, who himself signed letters and accounts constituting the false representations of the fictitious cotton dealings, must be held to have been aware that he was lending himself to his brother's frauds. There was, therefore, a fraud practised on Mr. *Adamson* in which both the *Collies* were participators. And it has always been held in the Court of Chancery that for a fraud, as for a breach of trust, each participator is liable *in solido*. Some doubt was, however, suggested in the course of the argument whether proof could be made in bankruptcy for a fraud any more than for other torts. A great many cases—if cases were necessary—shew that proofs have been allowed in bankruptcy for fraud, and on the ground of fraud only, where on a mere breach of contract they would not have been admitted. A notable instance of this is in the proof allowed in *Read v. Bailey* (1), by the joint estate against the separate estate for moneys fraudulently abstracted from the partnership assets, a decision which only followed a whole line of recognised authorities. But, in truth, the proof is not for the fraud or for the tort. The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated. If a man had been defrauded of any money or property and the cheater afterwards became bankrupt, if the money could be earmarked, or if the thing could be found in specie, or traced, the assignees or trustees were made to give it back, or if it could not be earmarked or traced, then proof was allowed against the estate. It was a very common thing to have a suit against solvent persons and the assignees of a bankrupt, to set aside transactions as fraudulent, and to have a decree against the solvent persons, and a declaration of a right of proof against the estate of the bankrupt. This was done as a matter of course in the case of *Phosphate Sewage Company v. Hartmont* (2).

(1) 3 App. Cas. 94.

(2) 5 Ch. D. 394.

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In cases of fraud, or breach of trust, which is often only one form and instance of fraud, there never was any division of liability between the tort-feasors; every person participating in the tort was liable to make good the whole; the liability of each in equity was for the whole amount. And the proof in bankruptcy was exactly commensurate with that liability; it being the established rule in bankruptcy that every debt which a person could, either in his own name or in the name of any other person, recover at law, or in equity, was a provable debt in bankruptcy. It is said in the books that debts due by reason of fraud or breach of trust are joint and several. There is here a slight inaccuracy. Of course tort-feasors may be sued all in one action, or in several actions, but there is not really or practically any joint liability as distinct from the several liability, except where there is a partnership and a joint estate. It is a mere accident, but a frequent accident, that the fraud is connected with a partnership, but where it is, the result often is that the partnership in its joint character is liable for it. If the profits or proceeds of the fraud found their way into the partnership, then on that ground the partnership became indebted for them, or if the fraud was in the course of the partnership business, and was practised by one of the partners on a client or customer of the firm, then the firm—however innocent the other partners may have been, and although the guilty partner alone stole the plunder—was held liable to make full restitution to the defrauded client or customer. But this right to go against the partnership assets did not relieve the guilty party or parties of his or their personal and separate liability by reason of his or their actual participation. If in a partnership of *A.*, *B.*, *C.*, and *D.*, and in a partnership matter, *A.* and *B.* shared in a fraud upon a customer, they would be severally liable, and the joint estate would be liable to make restitution; but not the separate estates of *C.* and *D.* And the rule about joint and several liability must be read with this qualification; but, so qualified, the rule is a well-established rule. And, according to this rule, Mr. *Adamson* was not entitled to go against the joint estate and the separate estates, but had to make his election. It is not too late for him now to elect, and it must therefore be declared that he is entitled to prove against the separate estates of *Alexander* and *William Collie* in

respect of the bills which he was induced to accept by their fraud; but he must withdraw his proof from the joint estate and refund the dividend accordingly, and it must be referred back to the Registrar to ascertain the amount on the footing of this declaration. Under the circumstances, the proper order as to costs will be to allow him to add his costs in the Court below and here to the amount of his proofs against the separate estates.

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BRAMWELL, L.J.:—

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In this case the facts and the conclusions I draw from them, so far as they need be stated, are as follow: The Appellant *Adamson* and the bankrupts agreed to have a joint speculation in, among other things, cotton. The bankrupts were to buy and sell cotton on joint account. The cotton was to be paid for by the bankrupts, who were to draw on the Appellant for the amount of the price. They could then procure the bills to be discounted, and, with the proceeds, pay the price of the cotton; or, of course, if their means had enabled them, they might have kept the bills and paid for the cotton out of their general funds. If, when the bills became due, the cotton was not sold, then the bankrupts were to draw fresh bills on the Appellant, and, as before, or out of their general funds, provide for the former bills. The bankrupts represented to the Appellant that they had bought quantities of cotton and drew bills on him for the amount of the price. These bills he accepted. They were renewed from time to time, and ultimately the last renewals were paid by the Appellant. It turned out that the statement that cotton had been bought was false and fraudulent, that scarcely any had been. Consequently, there was no cotton out of the proceeds of which the Appellant could be reimbursed, and, the bankrupts having stopped payment before the last renewed bills became due, the Appellant is now the amount of them out of pocket. Further, the fraud, on the evidence before us, must be taken to be a fraud by each of the bankrupts as much as by either. Under these circumstances the Appellant had a claim on the bankrupts which he might have presented in any one of three shapes. He might have omitted all mention of fraud, and, relying on the contract of the bankrupts, might have complained that they had not bought cotton on joint

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account and have sued them for unliquidated damages; or he might have put his claim as for a liquidated sum by shewing the facts, with no statement of fraud, and saying that the law raised a duty in the bankrupts to pay the bills, the same as in the case of an accommodation bill, and that, therefore, his payment under the compulsion of being the acceptor was a payment by him for them. Had he put his case in either of these ways, he would have put it in a way which entitled him to prove against their joint estate, either for a specific ascertained debt or for unliquidated damages, and not against either separate estate. Or he might have maintained a claim against them for a tort, for the fraud they had committed, in which case one may observe that, according to *Barwick v. English Joint Stock Bank* (1), one partner would be liable for the fraud of the other, even if personally innocent of it. This claim he might have maintained against both jointly or either separately from the other for unliquidated damages, and, except that he is precluded by his proof, might do so now; for if he had shaped his case in this way, he would have shaped it in a way which shewed that he had not a provable claim, and so the bankruptcy of those liable would be no impediment to his maintaining an action against them. These are the ways in which he might have shaped his claim at common law before the *Judicature Act*, and so he may now. But, besides these three ways of shaping and enforcing his claim, it appears there is another. It seems that a Court of Equity, before the *Judicature Act*, where a definite specific sum of money was obtained by fraud by two or more persons, would decree a restitution of the sum so obtained, and make the decree against the Defendants joint and several. Why, I know not. If there was no fraud the Plaintiff would be sent to law. So he would if the damages were unliquidated. But where there was the combination of two things neither of which was enough, the Court of Equity would grant relief. So, of course, must the High Court now. So that the Appellant may now maintain an action for the fraud, and recover, as I have pointed out, in accordance with the former common law practice, unliquidated damages against the Defendants jointly, or, according to the former equity practice, a liquidated sum against them jointly and severally.

(1) Law Rep. 2 Ex. 259.

But how does this entitle him to prove for the liquidated sum due and recoverable for a fraud, any more than he could for the unliquidated sum due and recoverable for a fraud? It is to be remembered that he has not got a judgment. If he had, the amount would be provable, whether recovered for a fraud, a slander, or any other tort. What is the difference between the two claims both founded on fraud? One is a claim for a liquidated, the other for an unliquidated sum. But that is an immaterial difference, as claims for unliquidated amounts are provable now. What other difference is there? The former equity decree for the liquidated sum would be against the Defendants jointly and severally. The judgment at common law would be against them jointly only. But this makes no difference; the foundation of the claim is the same, and, as I have said, no judgment has been got. And though the common law judgment is not against the Defendants jointly and severally, its effect is nearly the same. If the claim for the unliquidated amount is not provable, why is that for the liquidated? The reason why the one is not provable is equally applicable to the other. And that reason is this, that the law does not allow it. Claims founded on tort are not provable; nothing is provable but those claims which arise out of contract. The *Bankruptcy Act*, sect. 1, says, "Debt provable in bankruptcy shall include any debt or liability by this Act made provable in bankruptcy." Sect. 31 says, "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy." If that was all, it might be said that this is not a demand in the nature of unliquidated damages, and therefore not prohibited. True, it may not be thereby prohibited, but the next clause is "save as aforesaid all debts and liabilities," &c., shall be deemed to be debts provable, and "liability" is afterwards said to include a variety of matters all of which suppose an express or implied contract. There are, no doubt, provable debts where there is no contract, as a debt on a judgment. But in such cases the law implies a duty to pay it. But, certainly, till the present case, it was never supposed that a claim for a wrong was provable, or that the discharge of the bankrupt released him from such a claim. Would the discharge of these bankrupts discharge them from an action against them in the form of the old suit in Equity

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for a joint and several decree for payment of money? The proof against the separate estate in *Read v. Bailey* (1) was the proof of a debt. The proof in *Phosphate Sewage Company v. Hartmont* (2) was ordered without the question being mooted as to whether the ground of fraud in the case prevented the proof. The proof against the separate estate of the infant obligor of a joint and several bond was allowed, because it was a joint and several bond, and he was held to be bound by it. Breaches of trust are provable against joint or separate estate, because, I suppose, trustees are held to undertake jointly and severally for the performance of their duties, not because there is fraud in breach of trust. There may be a breach of trust where in all good sense there is no pretence for saying there is fraud. To my mind, then, the present claim is contrary to principle, contrary to the statute, and without precedent. Mr. Justice *Lindley's* opinion is clearly against it. On the other point, whether the Appellant is too late to change his proof, I am in his favour. I will only add that I cannot see that the separate estate has any ground for complaint, except that the proof comes late, which is no objection; and that the joint estate cannot complain that it is relieved of a proof. But, on the other ground, I am of opinion that the appeal should be dismissed.

The Court gave the trustee leave to appeal to the House of Lords, on condition of his presenting the appeal within a month.

August 1. *Winslow*, Q.C., for the trustee, asked that, in drawing up the order, provision should be made for payment of interest by the Appellant on the dividend which he was to refund.

De Gex, Q.C., for the Appellant:—

Interest was not asked for when the appeal was heard, and it would be contrary to the practice to give it where money has been received by mistake: *Ex parte Waring* (3); *Ex parte Law* (4); *Ex parte Lubbock* (5). The Appellant has lost a dividend on the separate estate.

(1) 3 App. Cas. 94.

(3) 3 D. M. & G. 445, n.

(2) 5 Ch. D. 394.

(4) Mont. & Ch. 111.

(5) 4 D. J. & S. 516.

JAMES, L.J. :—

The point may be a new one, but I have not the slightest hesitation or difficulty in making a precedent. The Appellant comes to the Court to be relieved from his own mistake, and justice requires that he should fully reimburse the joint estate. The principle of the judgment was refunding, and the money must be refunded with reasonable interest. The interest will be at the rate of 4 per cent. The order will be dated to-day. The costs of this application will be part of the costs of the appeal.

BRETT and COTTON, L.JJ., concurred.

The time for appealing to the House of Lords was extended.

Solicitors for Appellant: *Ashurst, Morris, Crisp, & Co.*

Solicitors for Trustee: *Travers Smith & Braithwaite.*

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PASHLER v. VINCENT.

[1877 P. 25.]

Composition—Registration of Resolutions—Protection of Debtor—Debt incurred by Fraud—Breach of Trust—Attachment—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 12, 126—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 15—Bankruptcy Rules, 1870, r. 289.

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The provisions for the protection of a debtor in sect. 12 of the *Bankruptcy Act*, 1869, and rule 289 of the *Bankruptcy Rules*, 1870, do not apply to composition.

After the registration of composition resolutions the composition proceedings are no longer pending.

Decision of *Bacon*, V.C., reversed.

THE Defendant, who was an auctioneer, was employed by the Plaintiff to let a house and to sell some furniture for her. He received £150 on her account, and retained the greater part of it in his possession. This action was commenced in January, 1877, claiming to have an account taken of what was due from the Defendant to the Plaintiff in respect of moneys received by him as her trustee or agent, and an order for payment of what should be found due. On the 28th of March, 1877, an order was made

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 Statement.
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that the Defendant should leave at Chambers an account of all sums of money received by him as trustee or agent for the Plaintiff for or on account of the Plaintiff, and of the application thereof. On the 6th of April, 1877, the Defendant carried in an account under this order, which shewed that a balance of £65 15s. was due from him to the Plaintiff. On the 15th of June, 1877, an order was made that the Defendant should, on or before the 9th of July, 1877, or subsequently within seven days after service of the order upon him, pay the £65 15s. into Court. He failed to obey this order, and, on the 24th of January, 1878, an order was made giving the Plaintiff liberty to issue an attachment against the Defendant for his contempt in not having paid the £65 15s. into Court, but that the attachment should not be executed until after the 30th of January, 1878, and that the Defendant should pay the Plaintiff's costs of the motion, and of and consequent upon the attachment. On the 29th of January, 1878, the Defendant filed a liquidation petition. The first meeting of the creditors was held on the 23rd of February. In the statement of the Defendant's affairs produced at the meeting the Plaintiff's debt was entered, and was estimated as amounting, with costs, to £100. The creditors resolved to accept a composition of 2s. in the pound, payable in four instalments of 6d. each, respectively on the 1st of June, the 1st of September, and the 1st of December, 1878, and the 1st of March, 1879. At the second meeting, on the 6th of March, the resolution was confirmed, and it was registered on the 11th of March, 1878. The Plaintiff took no part in the proceedings at either of the meetings. On the 8th of March the Chief Clerk made his certificate in the action, finding that £121 16s. 6d. was due from the Defendant to the Plaintiff. On the 31st of May, 1878, the Defendant was arrested under a writ of attachment issued by the Plaintiff, and was lodged in *Holloway Prison*. On the 27th of June the Defendant applied to the Vice-Chancellor to rescind the order of attachment of the 24th of January, and for his discharge from custody, on the ground that he had no means of paying the £65 15s.

The Defendant appeared in person.

Hemming, Q.C., and *Edwin Ward*, for the Plaintiff.

BACON, V.C., ordered that, upon the Defendant paying to the Plaintiff her costs of the order to attach him, and of and consequent upon his attachment, and also upon payment of a composition of 2s. in the pound in respect of the sum of £65 15s., he should be discharged from custody.

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The Plaintiff appealed. The appeal was heard on the 10th of July, 1878.

C. A.

Hemming, Q.C., and *Edwin Ward*, for the Appellant:—

Argument.

The Plaintiff's debt having been incurred by means of the Defendant's fraud, the composition is not binding on her, she not having assented to it: *Debtors Act*, 1869, s. 15. She is therefore entitled to pursue her ordinary remedies, and the order for the release of the Defendant ought not to have been made. Moreover, even if the composition were binding, the provisions in the *Bankruptcy Act* and Rules as to protection of the bankrupt or arranging debtor pending the proceedings do not apply to a compounding debtor. Lastly, if they did, the proceedings here were not pending when the writ was enforced.

W. W. Cooper, for the Defendant:—

There ought to have been an unconditional order for the Defendant's release. The composition proceedings are pending until the composition has been paid; and though the Defendant will not then be discharged from the debt, he is entitled to protection during the pendency of the proceedings, just as he would be in a bankruptcy or a liquidation by arrangement: *Bankruptcy Act*, 1869, s. 12; *Bankruptcy Rules*, 1870, r. 289; *Cobham v. Dalton* (1); *Ex parte Mauthner* (2); *Ex parte Mills* (3); *Earl of Leves v. Barnett* (4).

JESSEL, M.R.:—

Judgment, C. A.
Jessel, M.R.

I think we cannot discharge this debtor. Sect. 15 of the *Debtors Act*, 1869, provides that "Where a debtor makes any arrangement or composition with his creditors under the pro-

(1) Law Rep. 10 Ch. 655.

(3) Law Rep. 6 Ch. 594.

(2) 3 Ch. D. 113.

(4) 6 Ch. D. 252.

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Jessel, M.R.

visions of the *Bankruptcy Act*, 1869, he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends." No doubt this particular debt was incurred by fraud, and therefore the debtor comes within the exception of sect. 15. It is plain that the Appellant has not assented to the composition. I am utterly unable to understand upon what ground the Vice-Chancellor's order was made. It is suggested that the case is like that of pending proceedings in a bankruptcy, as in *Cobham v. Dalton* (1). But there are no pending proceedings in the present case, for the resolution was registered before the attachment was executed; and, even if there had been anything pending, the provisions of sect. 12 and rule 289 for the protection of the debtor do not apply to composition. There being no such provision for his protection, and there being this express law in sect. 15 of the *Debtors Act*, I am of opinion that the Vice-Chancellor's order cannot be sustained. The appeal will be allowed, with costs in both Courts.

BRETT and COTTON, L.JJ., concurred.

Solicitor for Appellant: *G. Biller*, Junr.

Solicitor for Debtor: *W. F. Morris*.

(1) Law Rep. 10 Ch. 655.

END OF VOL. VIII.

ACCUMULATIONS—*continued*,
that as to the surplus rents and income which would accrue between the expiration of twenty-one years from the testator's death and the death of his widow, there was an intestacy; and that *T. M.* was not entitled during the life of the widow to ask for payment of the accumulated funds, subject to provision being made for payment of the annuity and legacies. *WEATHERALL v. THORNBURGH* - - - **C. A. 261**

ACQUIESCENCE—Profit by agent - - - **286**
See **PRINCIPAL AND AGENT**. 2.
— Waste - - - - - **521**
See **WASTE**.

ACT OF BANKRUPTCY—Bill of sale—Notice of legal proceedings - - - **230**
See **BANKRUPTCY**. 1.

ADEMPTION - - - - - **101**
See **WILL**. 8.

ADMINISTRATION — *Action for* — *Creditors* — *Priority*—*Transfer of Action in Exchequer Division to Chancery Division*—*Rules of Court, 1875, Order LI., r. 2.]* An order nisi to sign judgment had been obtained in a creditors' action against an executrix in the Exchequer Division, for a balance admitted to be due from a testator's estate, but before judgment was signed a decree for the administration of the same estate in the Chancery Division had been obtained by another creditor. On the motion of the parties to the administration action for the transfer of the first action to the Chancery Division:—*Held*, that the creditors who were Plaintiffs in the Exchequer action had no priority over the other creditors, and that the action must be transferred, and the proceedings therein stayed, the Plaintiffs in that action to be at liberty to prove for their claim and costs in the administration. *In re STUBBS' ESTATE, HANSON v. STUBBS* - - - **154**

ADMISSIONS—Accounting party - - - **84, 148**
See **PRACTICE**. 11, 12.

ADVANCEMENT—*Children*—*Statute of Distributions* (22 & 23 Car. 2, c. 10), s. 5—*Annuity*
K 1

ADVANCEMENT—*continued.*

granted in Intestate's Lifetime.] By a deed of separation the husband covenanted to pay an annuity of £200 to each of his daughters during their respective lives, such annuities to cease if he should again cohabit with his wife, which event did not happen. The husband survived his wife and died intestate. In the distribution of his personal estate among his children under the *Statute of Distributions*:—*Held* (reversing the decision of *Hall, V.C.*), that so much of the annuities to the daughters as were paid during their father's lifetime were not in the nature of advancements; and that the value of each annuity must be estimated as at the death of the intestate, and the amount brought into hotchpot. *HATFIELD v. MINET* - - - - - C. A. 136

ADVERTISEM^{ENT}—Adjudication of bankruptcy
See **BANKRUPTCY**. 18. [367]

AFFIDAVIT—Evidence - - - 510
See **PRACTICE**. 7.

AGENT - - - - - 160, 286
See **PRINCIPAL AND AGENT**. 1, 2.

— Solicitor—Taxation of costs - - - 598
See **BANKRUPTCY**. 7.

AMALGAMATION OF COMPANIES - 679
See **COMPANY**. 2.

ANNUITY—*Will—Gift of Annuity—Direction to pay out of Income of Residuary Estate—Charge on Corpus—Charging Prospective Income.* A testator bequeathed life annuities to various persons, and then bequeathed his general personal estate to trustees, "upon trust out of the income thereof to pay and keep down" the annuities, and, "subject thereto," upon trusts for his son and daughters:—*Held*, that the annuities were chargeable on the corpus. *In re MASON, MASON v. ROBINSON* - - - - - 411

— To child—*Statute of Distributions—Advancement* - - - - - 136
See **ADVANCEMENT**.

APPEAL - - - - - 318, 492, 643, 806
See **PRACTICE**. 1—4.

APPROPRIATION—Remittances to cover advances - - - - - 160
See **PRINCIPAL AND AGENT**. 1.

ARBITRATION—*Partnership—Agreement to refer Disputes to Foreign Tribunal—Dissolution—Stay of Proceedings—Receiver—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 11.* The Plaintiff and three other persons, G., N., and F., all British subjects, entered into an agreement, in the Russian language and registered in *Russia*, to trade in co-partnership in *Russia*, providing (*inter alia*) that the head office of the firm should be in *St. Petersburg*; and reserving to G. and N. the right to recall their capital within a year, and, if not paid within a month, the firm was to be wound up; and also providing that "all disputes, no matter how or where they shall arise, shall be referred to the *St. Petersburg Commercial Court*," whose decision should be final. The Plaintiff alleged that there was a contemporaneous English agreement, not registered in *Russia*, by which G. and N. agreed to compensate the Plaintiff in the event of a dissolution within a year, under the powers reserved to them. The two partners exer-

ARBITRATION—*continued.*

cised their right within the year to recall their capital, and immediately took steps to wind up the partnership in *Russia*. The Plaintiff having thereupon commenced an action in *England*, alleging that the proceedings of his co-partners, the Defendants, were taken without his knowledge and sanction, and were invalid and not binding on him, and claiming a dissolution of the partnership, relief in respect of the English agreement, the appointment of a receiver and other relief, the Defendants moved for a stay of proceedings in the action and a reference to the *St. Petersburg Commercial Court*:—*Held*, that an agreement to refer all disputes to a foreign Court is within the 11th section of the *Common Law Procedure Act, 1854*, and that the Defendants were entitled to an order on their motion; and that, although the Court had jurisdiction to appoint a receiver pending a reference to arbitration, it was not proper to do so unless a special case was made, as the course of liquidation before the tribunal chosen by the parties themselves would thereby be interfered with.—*Semble*, if a sufficient case were shewn for granting an injunction the Court would not stay proceedings. *LAW v. GARRETT* - - - - - C. A. 26

ASSENT OF EXECUTORS—Legacy - 777
See **TRUSTEE**. 1.

ASSIGNMENT—Copyright—Not in writing 404
See **COPYRIGHT**.

AUCTION—Memorandum of sale—*Statute of Frauds* - - - - - 467
See **FRAUDS, STATUTE OF**. 1.

BANKER—Partnership assets - - - 444
See **PARTNERSHIP**. 1.

— Remittance to cover advances - - - 160
See **PRINCIPAL AND AGENT**. 1.

BANKRUPTCY—*Act of Bankruptcy—Bill of Sale—Promise to give Bill of Sale to secure Repayment of Advance—Undertaking to give Notice of Legal Proceedings—Execution of Bill of Sale after Notice given of Legal Proceedings.* The debtor having borrowed £450 from Mrs. H., promised to give her a bill of sale for the amount when called upon to do so. In the following year Mrs. H. died, without having called for the bill of sale, and leaving the debt still owing. The debtor renewed his promise to Mrs. H.'s executor, and undertook to let the executor know if he was threatened with legal proceedings. Shortly afterwards he was threatened, and gave notice to the executor, who applied for a bill of sale, which the debtor then executed, including substantially all his property. It was registered on the following day, being the 2nd of June, 1877. On the 17th of July the debtor was served with a debtor's summons. He gave notice to the bill of sale holder, who on the 19th or 20th went into possession, and sold the goods on the 23rd:—*Held*, that the bill of sale was fraudulent and void as against creditors. *In re GIBSON. Ex parte BOLLAND* 230

2. — *Chose in Action—Order and Disposition—Charge by a Partner on his Share in Partnership—Bankruptcy Act, 1869, s. 15, sub-s. 5—Bills of Sale Act, 1854, s. 7—Joint Ownership.* B., as

BANKRUPTCY—continued.

trustee and executor of his father's will, became entitled to one half share in a distillery business lately carried on in partnership between his father and another. In pursuance of a provision in the will, *B.* continued the partnership business, and afterwards purchased the interest of the beneficiaries under the will, and executed mortgages to secure the purchase-money, by one of which, dated September, 1872, *B.* assigned all his beneficial interest under his father's will as a security for payment of the money due, and by the same deed charged all his share and interest in the distillery partnership, and in the good-will of the business, with the repayment of the money due. New articles of partnership were then entered into between *B.* and the old partner, in which the former appeared as the owner of one half the business.—In June, 1877, *B.* was adjudicated bankrupt, and his share in the partnership had since been sold to the other partner:—*Held*, as between *B.*'s trustee in bankruptcy and the mortgagee, that the mortgage of *B.*'s share and interest in the partnership was a charge upon a *chose in action*, and as such, was not affected by the *Bankruptcy Act*, 1869, s. 15, or by the *Bills of Sale Act*, 1854:—*Held*, also, that to bring partnership goods within the order and disposition clause, they must have been in the sole and absolute possession of the bankrupt; and that, as the mortgagee of *B.*'s share had not acquired the right to take possession of any of the partnership property, *B.* was not in possession with the consent of the true owner.—*Ex parte Dorman* (Law Rep. 8 Ch. 51) followed.—*Ryall v. Rowles* (1 Ves. Sen. 375) considered. *In re BAINBRIDGE. Ex parte FLETCHER* - - - 218

3. — *Chose in Action—Order and Disposition—Reputed Ownership—Policy of Assurance—Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), s. 15, sub-s. 5.] A policy of life assurance is a "thing in action," and is therefore excepted from the operation of the reputed ownership clause, sect. 15, of the *Bankruptcy Act*, 1869. *Ex parte IBBETSON. In re MOORE* - - - C. A. 519

4. — *Composition—Pending Proceedings for Composition—Costs—Varying Provisions of Composition—Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), s. 126—*Bankruptcy Rules*, 1870, rr. 292, 297.] The creditors of a debtor who had filed a liquidation petition resolved to accept a composition of 15s. in the pound, payable in four instalments, to be secured by the joint and several promissory notes of the debtor and a surety. The resolution was registered, and the receiver who had been appointed gave up possession of the estate to the debtor. The promissory notes were delivered to the creditors. When the first instalment became due neither the debtor nor the surety could pay it. Two days before it became due the debtor's solicitor applied to the Court for leave to summon a meeting of the creditors for the purpose of submitting a resolution to vary the provisions of the composition. Leave was given, but the receiver was reappointed. A meeting was held, and it was resolved to accept a composition of 3s. in the pound, payable in three instalments, the second and third of which were to be guaranteed by sureties. The resolution was confirmed at a second meeting, but registration was refused, and

BANKRUPTCY—continued.

the debtor was adjudicated a bankrupt. The debtor's solicitor applied to the Court to order the costs of the abortive proceedings to reduce the composition to be paid out of the bankrupt's estate, but the application was refused in the County Court and afterwards by the Chief Judge:—*Held*, that the abortive proceedings were not "pending" at the time of the bankruptcy, within the meaning of rule 292 of the *Bankruptcy Rules*, 1870, and that at any rate the exercise by the County Court of the discretion given to it by the rule ought not to be interfered with; and that the proceedings to reduce the composition were not authorized by the 6th clause of sect. 126 of the *Bankruptcy Act*, 1869.—*Ex parte Jeffery* (Law Rep. 9 Ch. 144) distinguished. *Ex parte HOPPER. In re ELLIOTT* 53

5. — *Composition—Registration of Resolutions—Protection of Debtor—Debt incurred by Fraud—Breach of Trust—Attachment—Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), ss. 12, 126—*Debtors Act*, 1869 (32 & 33 Vict. c. 62), s. 15—*Bankruptcy Rules*, 1870, r. 289.] The provisions for the protection of a debtor in sect. 12 of the *Bankruptcy Act*, 1869, and rule 289 of the *Bankruptcy Rules*, 1870, do not apply to composition.—After the registration of composition resolutions the composition proceedings are no longer pending.—Decision of *Bacon, V.C.*, reversed. *PASLER v. VINCENT* - - - C. A. 825

6. — *Composition—Surety—Default in Payment—Payment in Part by Surety—Rights of Creditors and Surety—Election—Proof in Bankruptcy—Protected Transaction—Notice of Act of Bankruptcy "available for Adjudication"—Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), ss. 11, 94, 95.] Where creditors agree to accept a composition payable in instalments, some of which are guaranteed by a surety, if default is made in the payment of any one instalment the creditors have a right to sue the debtor, or to prove in his bankruptcy, for the balance of their original debts, after deducting what they have received, either from the debtor or the surety, in respect of the composition, and not merely for the amount of the unpaid instalments of the composition.—And the surety, though he is entitled to prove in the debtor's bankruptcy for what he has paid in respect of the composition, has no right to put the creditors to an election whether they will carry out the composition arrangement *in toto* or reject it *in toto*.—The words "notice of an act of bankruptcy available for adjudication" in sects. 94 and 95 of the *Bankruptcy Act*, 1869, mean notice of an act of bankruptcy which would have been available for the making of the adjudication actually made, that is, an act of bankruptcy committed within six months from the presentation of the petition on which the adjudication was founded. *Ex parte GILBEY. In re BEDELL*

[C. A. 248]

7. — *Costs—Charges and Expenses of Country Solicitor attending an Appeal in London—London Agent—Taxation.*] A country solicitor personally attending an appeal instead of employing his London agent, will, on taxation, be allowed the additional charges and expenses thereby occasioned. *In re FOSTER. Ex parte DICKENS* 598

BANKRUPTCY—continued.

8. — *Costs—Shorthand Writer appointed by Judge—Costs of Transcript included in Costs of Hearing—Discretion—Bankruptcy Rules, 1870, rr. 188, 207.* The costs of the transcript of a shorthand writer's notes of evidence are, like other costs, in the discretion of the Judge within rule 188 of the Bankruptcy Rules, 1870, notwithstanding the provisions with reference to these costs made by rule 207. *In re ALBEZETTE. Ex parte SMITH* - - - - - 599

9. — *Execution Creditor—Fi. fa.—Seizure without Sale—Subsequent Liquidation—Costs of Possession and of preparing for Sale—Payment by Trustee—Bankruptcy Act, 1869, s. 87.* A sheriff's officer seized the goods of a trader debtor under a *fi. fa.* for more than £50, and advertised them for sale. Before the sale could take place the debtor filed a petition for liquidation, and the trustee obtained an injunction restraining the sale, and possession was then given up. Upon the application of the sheriff for his expenses:—*Held*, that the fact of there having been no sale, and the liquidation of the debtor, did not affect the right of the sheriff to be paid by the trustee the necessary expenses of possession and of preparing for sale. *In re CRAYCRAFT. Ex parte BROWNING* - - - - - 596

10. — *Jurisdiction—Debtor to Bankrupt's Estate—"Property"—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 4, 65, 66, 72, 98—Principal and Factor—Principal's Bills accepted by Factor—Bankruptcy of Principal—Sale of Goods by Factor to meet Acceptances—Bankruptcy of Factor before Payment of Acceptances—Right of Principal's Trustee to Proceeds of Sale.* The Court of Bankruptcy, even if it possesses jurisdiction under sect. 72 of the *Bankruptcy Act, 1869*, to enforce a simple money demand by the trustee of a bankrupt's property against a third party (as to which *quære*), ought not to exercise the jurisdiction, but ought to leave the demand to be enforced by the trustee in an action in the ordinary way.—Commission agents accepted bills drawn upon them by their principals for part of the value of goods consigned to the agents for sale. After the principals had filed a liquidation petition the agents sold the goods in order to reimburse themselves the amount of one of the bills which they had paid, and to provide funds to meet the others which were soon to become due. Before the latter bills were paid the agents filed a liquidation petition. They had spent all the proceeds of the sale. Their creditors agreed to accept a composition, which was paid to the holders of the bills, some of whom claimed to prove in the liquidation of the principals. The principals' trustee applied to a County Court in Bankruptcy for an order that the agents should pay to him the balance of the proceeds of sale, after deducting the amount of the bill which they had paid in full, and the composition which they had paid in respect of the others:—*Held*, by the Chief Judge (reversing the decision of the County Court Judge), that the trustee was not entitled to the order.—*Held*, by the Court of Appeal, that the trustee's demand against the agents was a mere demand for a debt due to the principal's estate, and that the Court of Bankruptcy ought not to

BANKRUPTCY—continued.

assume jurisdiction to try it. *Ex parte DICKIN. In re POLLARD* - - - - - C. A. 377

11. — *Liquidation—Order and Disposition—Three Years' System of Hire—Custom—Bankruptcy Act, 1869, s. 15, sub-s. 5.* Four months previously to his bankruptcy the debtor hired a piano from H. & Co. upon the following written terms: £15 a year for three years by equal monthly payments of 25s.; at the expiration of which term the piano became the absolute property of the hirer; but in case the instalments were not paid, or in the event of the death, bankruptcy, or insolvency of the hirer before the expiration of the term, H. & Co. were to be at liberty to determine the hiring and take possession of the instrument. There was no special mark or label on the piano to shew that it was not the property of the debtor. Upon the bankruptcy, H. & Co. removed the piano from the debtor's premises. The trustee claimed the piano as being within the order and disposition of the debtor. There was evidence of a custom of letting pianos on such terms:—*Held*, that the custom was sufficiently established, and one which the ordinary creditors of a bankrupt must be reasonably presumed to have known, and accordingly that the agreement for hire was, on the principle of *Ex parte Powell* (1 Ch. D. 501), valid, and did not come within the mischief contemplated by the *Bankruptcy Act, 1869, s. 15, sub-s. 5.* *In re BLANSHARD. Ex parte HATTERSLEY* - 601

12. — *Liquidation—Release of Trustee—Non-payment of Rent to Debtor's Landlord—Jurisdiction of Court of Bankruptcy—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 20, 53, 125, sub-s. 9.* A debtor filed a liquidation petition on the 14th of September, and on the 3rd of October a trustee was appointed. On the 26th of November the creditors resolved that the trustee should sell the debtor's estate for a sum sufficient to pay the creditors 4s. in the pound; that the debtor's discharge should be granted on the filing of the trustee's certificate that the provisions of this scheme of settlement had been complied with; and that the close of the liquidation and the release of the trustee should take place on and from the 28th of January. On the 4th of January these resolutions were approved by the Court. The debtor was tenant of some business premises and some chattels for a term which expired on the 25th of December. The trustee took possession of the premises and the chattels, and remained in possession of them until the expiration of the term, but he did not pay the landlord the quarter's rent which fell due on the 25th of December. On the 26th of February the landlord applied to the Court of Bankruptcy for an order directing the trustee to pay him that quarter's rent. There was evidence that several applications had been made to the trustee for the rent in the course of January, and that he had said that he had left money with the debtor to pay it:—*Held*, that either the landlord's remedy was a personal one against the trustee, in which case the Court of Bankruptcy had no jurisdiction in the matter, or that, if there was a remedy in the Court of Bankruptcy, the trustee had done nothing more than commit a default in the adminis-

BANKRUPTCY—continued.

tration of the assets, from liability for which he was protected by the release, there being nothing to shew that there had been any fraud in obtaining it.—*Ex parte Société Cockrill* (3 Ch. D. 115) distinguished.—Sect. 53 of the *Bankruptcy Act*, 1869, applies to a release given by the creditors to the trustee under a liquidation by arrangement. *Ex parte CARTER. In re WARE C. A. 731*

13. — “Mutual Dealings”—*Bankruptcy Act*, 1869, s. 39.] One of the terms of an engineering contract was that the plant brought by the contractor on to the works should “be deemed the property of” the employers “for the time being,” and should “not be removed during the progress of the work without the written order of the engineer,” and that in case of suspension of the works by the engineer for any act or default of the contractor, the same should be “subject to be used” in and about the completion of the works. The works were suspended by the engineer, the contractor went into liquidation, and the works having been completed by the employers, the plant was by consent sold:—*Held*, that the plant did not become the property of the employers, and that the user of the materials by the employers after the suspension of the works was not such a “dealing” within the meaning of the 39th section of the *Bankruptcy Act*, 1869, as that the employers were entitled to set off the value of the plant against the sum due to them from the contractor for breach of the contract. *In re WINTER. Ex parte BOLLARD - 225*

14. — Partners—Proof—Debt incurred by Fraud—Joint and Several Liability—Right of Election to prove against Joint or Separate Estates—Time when Election must be made—Estoppel by Receipt of Dividend—Refunding Dividend—Interest—*Bankruptcy Act*, 1869, ss. 4, 31, 49.] *Held*, by James and Baggallay, L.J.J. (*Bramwell, L.J.*, dissenting), that where a partnership debt has been incurred by means of a fraud on the part of the partners the defrauded creditor has a right to prove at his election against either the joint estate of the firm or the separate estates of the partners, even though no judgment has been recovered by him against the partners:—*Held*, by *Bramwell, L.J.*, that in such a case, judgment not having been recovered against the partners, there is no right to prove against the separate estates.—When a creditor has such a right of election he does not lose it merely because he has proved and received dividend. But he may change his election on refunding the dividend which he has received, with interest at 4 per cent., though he cannot disturb any dividend already paid. *Ex parte ADAMSON. In re COLLIE - C. A. 807*

15. — Partnership—Joint and Separate Estate—Ostensible Partner—Reputed Ownership—Leave to appeal to House of Lords—Question of Fact.] On the dissolution of a partnership between H., C., and P., notice was given to the creditors that the business would thenceforth be carried on by P. alone, under the firm of P., Son, & Co. After this the business was carried on under that firm, and a banking account was opened in that name. P.’s son constantly signed cheques upon that account in the name of the firm. He also accepted bills in

BANKRUPTCY—continued.

the name of the firm, negotiated loans to the firm, and sometimes ordered goods in the name of the firm. The name P. alone appeared on the outside of the business premises. The business was continued for a year and a half, and then P. and his son were, on the petition of a creditor of the business, jointly adjudicated bankrupts, as having traded as partners. They did not resist the adjudication. H., with whom, on the dissolution of the old partnership, P. had covenanted for the payment of £6105, part of the capital of H. in that partnership, applied to the Court to annul the adjudication. The Registrar refused the application, on the ground that, though no actual partnership had existed between the father and son, the son had been held out to the petitioning creditor as a partner, so as to entitle him to maintain the adjudication. This decision was not appealed from. H. then applied to the Court for a declaration that the assets of the business were separate estate of the father. Both father and son deposed that no actual partnership had subsisted between them, but that it was intended from the first that the son should be a partner if the business had turned out profitable. The petitioning creditor deposed that the son had been held out to him as a partner. Evidence tending in the same direction was given on behalf of another creditor. Eight other creditors (the whole number who had proved being eighty-two) deposed that they had always treated the son as being a partner, and constituting with the father the firm of P., Son, & Co.:—*Held*, that the assets must be treated as joint estate of father and son.—The rule that the doctrine of reputed ownership does not apply as between a dormant and an ostensible partner, does not include a case where the real owner of property allows it to be employed in a business in which another person is a partner with himself. In such a case the property will, in the event of bankruptcy, be, by virtue of the doctrine of reputed ownership, treated as joint estate of the two: *Per James, L.J.—Reynolds v. Bowley* (Law Rep. 2 Q. B. 474) distinguished.—*Ex parte Arbouin* (De G. 359), *In re Rowland & Crankshaw* (Law Rep. 1 Ch. 421), and *Ex parte Sheen* (6 Ch. D. 235) explained.—Leave to appeal to the House of Lords refused, on the ground that the question in dispute was merely one of fact. *Ex parte HAYMAN. In re PULSFORD C. A. 11*

16. — Preferential Debts—Proof—Dividend—Voluntary Bonds or Covenants—*Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), ss. 12, 32, 41.] By virtue of sect. 32 of the *Bankruptcy Act*, 1869, the old rule in bankruptcy, that debts arising upon voluntary bonds or covenants of a bankrupt are to be postponed in the receipt of dividends to debts for valuable consideration, has been abolished.—All debts, except those to which by sect. 32 priority is expressly given, are now entitled to receive dividends *pari passu*. *Ex parte POTTINGER. In re STEWART - C. A. 621*

17. — Proof—Gaming Debt—Illegal Consideration—Money lent to pay a lost Bet—5 & 6 Will. 4, c. 41, s. 1.] Money lent to enable the borrower to pay a debt which he has already lost does not constitute a debt for an “illegal consideration” within the Act 5 & 6 Will. 4, c. 41.—

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Consequently, such a debt can be proved in the bankruptcy of the borrower. *Ex parte* PYKE. *In re* LISTER - - - C. A. 754

18. — *Protected Transaction—Contract for Sale of Land—Payment of Purchase-money to Vendor after Adjudication of Bankruptcy, but without Notice of Adjudication—Rights of Purchaser—Advertisement of Adjudication—Delay—Assignee of Chose in Action—Notice—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 11, 15, 94, 95.* A bankrupt had, before adjudication, the purchaser having had no notice of any act of bankruptcy, contracted to sell some leasehold property, and had received a deposit in respect of the purchase-money. After the adjudication had been made, but before it had been advertised, the purchaser, having no notice of the adjudication, paid the remainder of the purchase-money to the bankrupt:—*Held* (reversing the decision of the Registrar), that the trustee in the bankruptcy could not be compelled to assign the lease to the purchaser except upon the terms of his paying the purchase-money.—Whether, if the lease had been assigned before the adjudication, but a part of the purchase-money had not been paid, and the purchaser had, after the adjudication, paid it to the bankrupt, without notice of the adjudication, he could have been compelled to pay it over again to the trustee, *quære*.—*Observations per James, L.J.*, on the practice of delaying advertisements of adjudications. *Ex parte* RABIDGE. *In re* POOLEY - - - C. A. 367

19. — *Secured Creditor—Garnishee Order Nisi—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 12, 16, sub-s. 4.]* A judgment creditor, who, before the filing of a liquidation petition by his debtor, has obtained a garnishee order *nisi* attaching debts due to the debtor, is a secured creditor within the meaning of sects. 12 and 16 of the *Bankruptcy Act*, 1869, and is, therefore, entitled to the attached debts as against the trustee in the liquidation, even though they did not become actually payable until after the commencement of the liquidation.—*Emanuel v. Bridger* (Law Rep. 9 Q. B. 286) and *Lowe v. Blakemore* (Law Rep. 10 Q. B. 485) followed.—*Ex parte Greenway* (Law Rep. 16 Eq. 619) disapproved. *Ex parte* JOSELYNE. *In re* WATT - C. A. 327

20. — *Undischarged Bankrupt—Property passing to Trustee—Damages in Action of Tort—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 4, 15.]* Under the *Bankruptcy Act*, 1869, as before it, damages in an action for a personal tort recovered by an undischarged bankrupt do not pass to his trustee.—Though, if the bankrupt had accumulated the money and invested it in property, the trustee might be entitled to the property, yet he cannot intercept the damages or prevent the bankrupt from expending them in the maintenance of himself and his family.—Decision of *Bacon, C.J.*, affirmed. *Ex parte* VINE. *In re* WILSON C. A. 364

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— **r. 289** - - - - - 825
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— **rr. 292, 297** - - - - - 53
See **BANKRUPTCY**. 4.

BENEFICE—Vicar of District Church—Mortgage of Pew Rents—Validity—13 Eliz. c. 20.] A mortgage of pew rents made by the vicar of a district church is void under the Act 13 Eliz. c. 20. *Ex parte* ARROWSMITH. *In re* LEYSON [C. A. 96

BILL OF SALE—Act of bankruptcy—Agreement to give when required - - - 230
See **BANKRUPTCY**. 1.

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See **WILL**. 8.

BREACH OF TRUST - - - 591, 777
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CANCELLATION OF SHARES—Power of company - - - 334
See **COMPANY**. 11.

CASES—Acton v. Woodgate (2 My. & K. 992) followed - - - 744
See **TRUSTEE**. 2.

— *Albion Steel and Wire Company, In re* (7 Ch. D. 547) explained - - - 535
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— *Arboun, Ex parte* (De G. 359), explained
See **BANKRUPTCY**. 15. [11

— *Dorman, Ex parte* (Law Rep. 8 Ch. 51), followed - - - 218
See **BANKRUPTCY**. 2.

— *Drinkwater v. Ratcliffe* (Law Rep. 20 Eq. 528) considered - - - 548
See **PARTITION**. 1.

— *Ellis' Trusts, In re* (Law Rep. 17 Eq. 409), considered - - - 460
See **HUSBAND AND WIFE**. 1.

— *Emanuel v. Bridger* (Law Rep. 9 Q. B. 286) followed - - - 327
See **BANKRUPTCY**. 19.

— *Garrard v. Lord Lauderdale* (2 Russ. & My. 451) followed - - - 744
See **TRUSTEE**. 2.

— *Greenway, Ex parte* (Law Rep. 16 Eq. 619), disapproved - - - 327
See **BANKRUPTCY**. 19.

— *Howe v. Lord Dartmouth* (7 Ves. 137) followed - - - 101
See **WILL**. 8.

— *Jeffery, Ex parte* (Law Rep. 9 Ch. 144), distinguished - - - 53
See **BANKRUPTCY**. 4.

— *Job v. Job* (6 Ch. D. 562) explained - 424
See **MORTGAGE**. 4.

— *Lamb v. Eames* (Law Rep. 6 Ch. 597) followed - - - 540
See **WILL**. 3.

— *Langridge v. Payne* (2 J. & H. 423) considered - - - 201
See **MORTGAGE**. 5.

— *Lowe v. Blakemore* (Law Rep. 10 Q. B. 485) followed - - - 327
See **BANKRUPTCY**. 19.

— *Powell, Ex parte* (1 Ch. D. 501), followed
See **BANKRUPTCY**. 11. [601

— *Reynolds v. Bowley* (Law Rep. 2 Q. B. 474) distinguished - - - 11
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- *Rossiter v. Miller* (5 Ch. D. 648) distinguished - - - 70
 See FRAUDS, STATUTE OF. 1.
- *Rowland & Crankshaw, In re* (Law Rep. 1 Ch. 421) explained - - - 11
 See BANKRUPTCY. 15.
- *Ryall v. Rowles* (1 Ves. Sen. 375) followed
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- *Saunders v. Jones* (7 Ch. D. 435) considered
 See PRACTICE. 14. [645]
- *Sheen, Ex parte* (6 Ch. D. 235), explained 11
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- *Société Cockrill, Ex parte* (3 Ch. D. 115), distinguished - - - 731
 See BANKRUPTCY. 12.
- *Upmann v. Elkan* (Law Rep. 12 Eq. 140 ; 7 Ch. 130) questioned - - - 372
 See TRADE-MARK. 1.

- CHARGING ORDER—Solicitor's lien** - 479
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CHARITY—Legacy—Direction to Executors to apply Residue to Charitable or Benevolent Purpose.] Testator, who died in October, 1875, after giving numerous charitable and pecuniary legacies, directed that his executors should apply to any charitable or benevolent purpose they might agree upon, and at any time, the residue of his personal property which by law might be applied to charitable purposes. The executors, in January, 1876, in writing, agreed that the residue should be paid to a charitable institution to which the testator had given a legacy:—*Held*, that the direction to the executors was indefinite and inoperative; that the gift failed; and that the next of kin were entitled. *In re JARMAN'S ESTATE. LEAVERS v. CLAYTON* - - - 584

2. — *Mortmain—Gift of Money to "support or found" a School*—9 Geo. 2, c. 36.] A gift by will of money for the "support" of a school does not necessarily imply that the money is to be "laid out or disposed of in the purchase of any lands, tenements, or hereditaments," so as to render the gift void under the *Mortmain Act* (9 Geo. 2, c. 36).—A testator bequeathed a sum of money to trustees to be applied by them in "supporting or founding" free or ragged schools for poor children in a particular parish. For some years prior to the date of the will and down to the testator's death there existed in the parish a school for the children of the poorest inhabitants, the testator being its principal supporter. It was held in a hired room, the rent of which was paid by the testator, who also paid the teacher's salary:—*Held*,—reading the will as creating an alternative trust,—a good charitable gift. *In re HEDGMAN. MORLEY v. CROXON* - - - 156

3. — *Scheme—Appropriation of Income in aid of Expenses of a School—Transfer of School to a School Board—Right of School Board to the Endowment—Elementary Education Acts, 1870, 1873 (33 & 34 Viet. c. 75, s. 23; 36 & 37 Viet. c. 86, s. 13).]* By the terms of a scheme, approved in 1852, for appropriation of the increased revenues of a charity estate originally applicable to the relief of the poor, it was provided that a sum of £90 should be paid by the charity trustees to the treasurer of

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a school association in aid of the expenses of a school in *Flint Street, Walworth*, "or any other school that may be established in its stead," provided that no sum should be paid to any denominational school; and that if such school should "become materially altered in discipline, number of children, or other circumstance," then the £90 should "in the discretion of the trustees" be applied "for educational purposes amongst other schools of a similar character" in the parish.—A transfer of the *Flint Street School* and its endowment having been made by the managers to the School Board for *London*:—*Held*, that the *Flint Street School* had not by the fact of such transfer become "materially altered in discipline, number of children, or other circumstance;" and that the trustees were bound to pay the endowment of £90 a year to the School Board. *SCHOOL BOARD FOR LONDON v. FAULCONER* - - - 571

4. — *School—Charity Trustees—Paying Fund into Court under Trustee Relief Act, without Notice to Charity Commissioners—Irregularity—Charitable Trusts Act, 1853, s. 17—Transfer to School Board—Settling Scheme—Aiding Local Rates.]* Although sect. 17 of the *Charitable Trusts Act, 1853*, does not prohibit charity trustees from paying their trust fund into Court under the *Trustee Relief Act*, and thereby relieving themselves from further liability and putting an end to their trust, it is irregular for them to follow that step up by presenting a petition for the administration of the charity funds. In all cases of doubt or difficulty as to the administration of the fund the trustees should apply to the Charity Commissioners under the *Charitable Trusts Act* before taking any legal proceedings with reference to the fund:—*Seemle*, in settling a scheme for the regulation of the funds of a charity school on its transfer to a school board, care should be taken to provide that the funds shall be applied for the advancement of learning in the school—as for instance, by establishing exhibitions or scholarships—and not for the general purposes of the school, which would have the effect of a grant in aid of the local rates. *In re POPLAR AND BLACKWALL FREE SCHOOL* - - - 543

— *Lease by—Void under 13 Eliz. c. 10* - 709
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— *Secret trust for* - - - 430
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CHOSE IN ACTION—Bankruptcy—Order and disposition - - - 218, 519
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CHURCH—Pew-rents - - - 96
 See BENEFICE.

COMPANY—Companies Act, 1867 (30 & 31 Viet. c. 131), s. 25—Issue of Shares.] A company was formed for working a mine in *Cornwall*, the purchase-money for which was to be paid in fully paid-up shares to be allotted to the vendor or his nominees. On the 18th of January the memorandum and articles and the contract with the vendor were sent down by post from *London* to be registered in *Cornwall*. On the following day the directors met in *London*, in the belief that all the documents had been registered, and the vendor nominated the allottees of his paid-up shares, and

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the directors resolved that they should be allotted accordingly. On the next day the managing director, finding that although the memorandum and articles had been registered the contract had not been registered, told the secretary not to issue certificates nor allow any dealings with the shares till it had been registered. The contract was registered on the 26th of January. No register of shareholders nor any books of the company were in existence till after the 26th, but before that day some of the paid-up shares had been transferred. No certificates were issued, nor was anything further done by the company with reference to the shares till after the 26th. The books were afterwards made up, treating the shares as allotted on the 19th, and registering the transfers as made on the days on which they bore date:—*Held*, that the shares were not to be considered as issued before the registration of the contract, and that they were to be treated as fully paid-up shares. *In re* AMBROSE LAKE TIN AND COPPER COMPANY. CLARKE'S CASE - - - C. A. 635

2. — *Ultra vires—Purchase of Business by Company—Transfer to purchasing Company of Shares of selling Company.*] The *B. N. Company* was an insurance company established with £10 shares, under a deed of settlement which provided that every instrument whereby the company became liable to pay money should contain a clause limiting the liability of shareholders to the amount payable on their shares. The deed contained a power to the company, with the sanction of an extraordinary general meeting, to purchase the business of any other company of a similar nature, upon such terms as the meeting should think fit. The company resolved to purchase the business of the *B. C. Company*, an insurance company whose capital was divided into £50 shares, on each of which £5 had been paid, and whose deed of settlement contained no power to sell the business. The transaction was completed by purchasing the shares of the *B. C. Company*, which were transferred to various officers of the *B. N. Company*. Subsequently a deed was executed by which these transferees transferred their shares to the *B. N. Company*, and thereupon that company was entered on the register of shareholders of the *B. C. Company*, and remained so registered for some years. This deed was never sanctioned by a general meeting of the *B. N.* shareholders. An order having been made for winding up the *B. C. Company*:—*Held*, that the transfer of the shares to the *B. N. Company* was *ultra vires* and invalid, and that the *B. N. Company* could not be placed on the list of contributories of the *B. C. Company*.—By the *European Arbitration Act*, 1875, it was enacted that as regards any determination or order given or made before the passing of the Act, no appeal should lie therefrom unless the arbitrator expressly certified in writing that by reason of differences between previous decisions on matters of principle it was desirable that an appeal should be brought:—*Held*, that a formal certificate from the arbitrator, and not a mere expression of opinion, was necessary to give the Court of Appeal jurisdiction; and that differences between previous decisions referred to decisions before the

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passing of the Act. *In re* EUROPEAN SOCIETY ARBITRATION ACTS. *Ex parte* LIQUIDATORS OF THE BRITISH NATION LIFE ASSURANCE ASSOCIATION - - - C. A. 679

3. — *Winding-up—Action by Mortgagee.*] The mere fact that an order has been made for winding up a company does not prevent a debenture-holder or mortgagee of the company from bringing an action to realize his security. *In re* LONGENDALE COTTON SPINNING COMPANY - 150

4. — *Winding-up—Directors—Companies Act, 1862, s. 165—Misapplication of Funds of the Company.*] *E.* agreed with *S.* that *S.* should get up a company to purchase and work a colliery which *E.* had power to sell; that *S.* should sell to the company for a certain price in cash and shares, and that the balance, after paying preliminary expenses, should be equally divided. *S.* promoted the formation of a company to purchase the colliery for £25,000 in cash and £25,000 in paid-up shares, and induced six gentlemen to become directors, engaging that they should be at no expense. The articles contained a clause empowering, but not binding, the directors to pay the preliminary expenses attending the formation of the company. Shortly before the company was registered an agreement was made between *S.* and the directors that *S.* should receive £3500 for preliminary expenses. On this occasion he produced a list of preliminary expenses, but did not produce vouchers, and no inquiry was made of him as to whether he was entitled to receive anything under his arrangements with *E.* *S.* received £3200 from *E.*, and received out of the funds of the company the £3500, out of which he paid the calls on the shares which the directors had taken to qualify them for the office. The company having been ordered to be wound up:—*Held*, by *Malins, V.C.*, that the directors were jointly and severally liable to repay to the company the sum so ordered to be paid to *S.* for preliminary expenses, on the ground that the money was paid in order to provide the directors' qualifications.—*Held*, on appeal, that this decision must be affirmed, for that the directors had by their agreement with *S.* disqualified themselves for exercising a discretion as to the payment of preliminary expenses, and had not used due care and caution in examining into the propriety of paying them, and that, irrespective of the fact of their calls having been paid out of the money received by *S.*, the payment to him was, under the circumstances, a misapplication of the funds of the company, for which they were liable under the *Companies Act*, 1862, s. 165. *In re* ENGLEFIELD COLLIERY COMPANY - - - C. A. 388

5. — *Winding-up—Distress for Rent—Companies Act, 1862, s. 163.*] A company entered into possession of leasehold property under an arrangement with the tenant, but without any arrangement with the landlord. The rent payable by the tenant being in arrear, the landlord put in a distress, and on the same day a petition for winding up the company was presented, on which a winding-up order was shortly afterwards made. The liquidator applied for an order under the *Companies Act*, 1862, s. 163, to restrain the landlord from selling the goods. The liquidator agree-

COMPANY—continued.

ing to allow the landlord to come in and prove for the rent, *Malins, V.C.*, made an order allowing him to do so, and restraining him from selling:—*Held*, on appeal, that the landlord was not a creditor of the company; that the Court had no jurisdiction to treat him as such; that sect. 163 does not apply where the person distraining is not a creditor of the company; and that the legal right of the landlord could not be interfered with. *In re* REGENT UNITED SERVICE STORES C. A. 616

6. — *Winding-up—Execution Creditor—Judgment and Execution—Companies Act, 1862* (25 & 26 Vict. c. 89), ss. 84, 87, and 163—*Bankruptcy Act, 1869* (32 & 33 Vict. c. 71), s. 87—*Judicature Act, 1875*, s. 10.] A company was sued in an action under the *Bills of Exchange Act*, and the Plaintiff, in consequence of repeated applications by the secretary and solicitors of the company, postponed proceedings in the action, and ultimately signed judgment and issued execution; a petition for winding up was presented, on which an order was afterwards made; the creditor lodged the writ on the day of presentation of the petition, and on the next day the sheriff seized and was in possession:—*Held*, that the postponement of the proceedings in the action having been caused by the applications made on behalf of the company for time, the creditor was entitled to the benefit of his judgment in priority to other creditors:—*Held*, also, that the right of the execution creditor was not affected by the 10th section of the *Judicature Act, 1875*.—Form of order.—In an action by another creditor, also under the *Bills of Exchange Act*, the company obtained leave to appear and defend, on the ground that there had been irregularity in regard to the bill of exchange, and that the Plaintiff had not paid the full amount for it. On application for further time to proceed with the defence, statements were made *bonâ fide* by the solicitor's clerk as to the solvency of the company and the improbability of a winding-up petition, and further time was given, and ultimately, the orders not having been complied with, the action proceeded. Two days after the presentation of the petition judgment was signed in the action and execution issued:—*Held*, that the creditor was not entitled to the benefit of his judgment, and that he must come in and prove his claim in the winding-up. *Ex parte* RAILWAY STEEL AND PLANT COMPANY. *In re* TAYLOR. *In re* WILLIAMS - - - 183

7. — *Winding-up—Execution Creditor—Priority—Applying Rule in Bankruptcy—“Secured Creditor”—Judicature Act, 1875*, s. 10—*Bankruptcy Act, 1869*, s. 87.] The rule in bankruptcy by which (*Bankruptcy Act, 1869*, s. 87) an execution creditor for more than £50 loses the benefit of his execution if the sheriff, within fourteen days after a sale, has notice of bankruptcy, applies, under sect. 10 of the *Judicature Act, 1875*, to a company in liquidation.—*In re* Albion Steel and Wire Company (7 Ch. D. 547) explained.—The solicitors of a company, being its creditors for more than £50, issued a writ of execution against the company, and on the 20th of December, 1875, lodged it with the sheriff, who thereupon took possession. On the 23rd of December a winding-up petition was presented, the

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company's solicitors being solicitors to the Petitioner, and on the 15th of January, 1876, a winding-up order was made, under which the sheriff withdrew, and the company's property was ordered to be sold by the liquidator, but it was declared that the execution creditors should have the same priority against the proceeds of the property as they would have had if it had been sold by the sheriff.—The property having been sold by the liquidator, but the proceeds being insufficient for payment of the company's debts, the execution creditors applied by summons to have their debt paid in priority to the other creditors.—Summons dismissed with costs. *In re* PRINTING AND NUMERICAL REGISTERING COMPANY - 535

8. — *Winding-up—Payment in Cash—Allotment of fully paid-up Shares for Services—Companies Act, 1867*, s. 25.] The proprietor of a newspaper agreed with a company to insert a series of advertisements in consideration of seventy-five fully paid-up shares in the company. Fully paid-up shares were accordingly allotted to him, but no contract was registered, as required by the *Companies Act, 1867*, s. 25. He sent the company a receipted bill and inserted the advertisements. The company was afterwards ordered to be wound up:—*Held*, that, as at the time of the allotment there was no debt payable to the allottee in cash by the company, the case was not within *Spargo's Case* (Law Rep. 8 Ch. 407); for that the allottee could not have sustained a plea of payment in an action by the company for calls, and that he must therefore be placed on the list of contributories as a holder of shares on which nothing had been paid. *In re* CHURCH AND EMPIRE FIRE INSURANCE FUND. *ANDRESS' CASE* - - - C. A. 126

9. — *Winding-up—Petition—Service—General Order, November, 1862*, r. 3—*Service on Solicitor*.] A winding-up petition having been presented by a creditor, the solicitor of the Petitioner informed the secretary and one of the directors of the fact. The whole of the directors then met, the Petitioner's solicitor being present, and passed resolutions assenting to the appointment of their secretary as provisional liquidator without prejudice to the right of the company to assent to or dissent from the proceedings of the Petitioner, and that C., the solicitor of a mortgagee of the share capital, should be instructed to take such steps as might be necessary in the interest of the company in relation to the foregoing resolution. C. accepted service of the petition, and appeared for the company on the motion for the appointment of an interim liquidator. The petition was not served at the office of the company. Some days after this a meeting of the company was held at which resolutions were passed that the company should be wound up voluntarily, and that P., the solicitor to the company, should be instructed to carry out the negotiations as to the winding-up. There was no previous resolution appointing P. the solicitor. The petition came on to be heard before *Malins, V.C.*, and counsel instructed by P. opposed on behalf of the company. A winding-up order having been made, notice of appeal was given by P. on behalf of the company:—*Held*, by *Malins, V.C.*, and on appeal, that as service of the petition had been accepted

COMPANY—continued.

on behalf of the company by a solicitor duly appointed for that purpose, service at the office of the company was not necessary:—*Held*, also, by the Court of Appeal, that P. had no authority to represent the company on the appeal. *In re* REGENT UNITED SERVICE STORES - C. A. 75

10. — *Winding-up—Petition—Who may present—Contributory—Companies Act, 1862, s. 82; Companies Act, 1867, s. 40.* A petition for winding up a company may be presented by persons who have obtained a decree of the Court ordering the company to allot them shares and to register them as shareholders, although their names are not on the register at the time of the presentation of the petition. *In re* PATENT STEAM ENGINE COMPANY - - - - - 464

11. — *Winding-up—Power to compromise—Cancellation of Shares—Past Members.* A company was established for effecting life insurances and insurances against such other kinds of risk as might thereafter be determined upon by general meeting. In March, 1872, a general meeting resolved that fire insurance and fidelity guarantees should be added to their business. New shares, called B shares, were issued to provide for this new branch of business, which was to form a separate department. The company were shortly afterwards advised that this proceeding was *ultra vires* and the B shares invalid; and one of the B shareholders obtained from the Court of Chancery an order removing his name from the register on that ground. An arrangement was accordingly made for starting a new company to take up the fire and fidelity guarantee business. The assets of the fire and fidelity department were to be handed over to the new company, which was to undertake the fulfilment of the contracts of that department. The new company was to issue to the B shareholders shares credited with the amounts paid by them respectively on their B shares, and the B shares were to be cancelled. The Appellant, who was a B shareholder, had shares allotted to him accordingly in the new company, and, on the 24th of September, 1873, his B shares were cancelled. On the 25th of April, 1874, a resolution was passed to wind up the old company. The Appellant, having been placed on the list of contributories, applied to have his name removed, which was refused by *Bacon, V.C.*:—*Held*, by the Court of Appeal, that the issue of B shares was not *ultra vires*, and that the B shareholders effectually became shareholders in the company:—*But held*, that a corporation or company has, as an incident to its existence, the same power of compromising claims made against it as an individual has, and that the cancellation of B shares being made as part of a *bona fide* arrangement for compromising a dispute whether those shares had been legally issued, was valid; and that the Appellant, from the time of the resolution for cancellation of his shares, ceased to be a member of the company:—*But held*, that, as the Appellant had legally been a shareholder, the cancellation could not affect any rights previously acquired by creditors; and that he must be on the list of contributories as a past member.—*In re* NORWICH PROVIDENT INSURANCE SOCIETY. BATH'S CASE - - - - - C. A. 334

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12. — *Winding-up—Voluntary—Dissolution—Companies Act, 1862, s. 143—Acquiescence.* The P. Company granted a mortgage of all its mining property to two trustees upon trust to secure, *pari passu*, the sums advanced by various lenders, of whom K. was one. Some time afterwards, it being thought desirable to reconstitute the company, resolutions were passed for a voluntary winding-up, and the liquidators agreed for the sale of the assets to the B. Company, which was formed for the purpose. The price was to be paid partly in bonds and partly in shares of the B. Company. A meeting of the mortgage creditors was held, at which the sale was unanimously approved of. K. was not present at this meeting, but there was evidence that he knew of and acquiesced in all that was done under the winding-up. The sale was completed and the property conveyed to the B. Company by a deed in which the mortgagees and their trustees did not join. Most of the mortgagees accepted debentures of the B. Company in satisfaction of their claims; but K. did not. The liquidators made their financial report, and called a meeting to consider it, pursuant to sects. 142, 143 of the *Companies Act, 1862*, and the return was registered. About three years after this K. presented a petition to wind up the P. Company:—*Held*, by *Hall, V.C.*, that the company could not be deemed to have been dissolved as against the Petitioner and other unsatisfied creditors; and that an order for winding it up ought to be made:—*Held*, on appeal, that as the Petitioner had all along known of and acquiesced in the winding-up proceedings, he could not now treat the dissolution as invalid:—*And, semble*, that there is no jurisdiction to wind up a company which has been dissolved under the *Companies Act, 1862, s. 143*, unless the dissolution can be impeached on the ground of fraud. *In re* PINTO SILVER MINING COMPANY - - - - - C. A. 273

COMPOSITION - - - - - 53, 248, 325

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COMPROMISE—Company—Cancellation of shares
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— Jurisdiction to enforce—Different branch of Court - - - - - 658
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CONCEALMENT—Contract—Suretyship - 469
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— Auction—Memorandum of sale - 467
See FRAUDS, STATUTE OF. 2.

CONSIDERATION—Illegality—Gaming - 754
See BANKRUPTCY. 17.

CONS. ORDERS—Order VII., r. 2 - - - 777
See TRUSTEE. 1.

CONSTRUCTIVE NOTICE—Agent - - - 160
See PRINCIPAL AND AGENT. 1.

CONTRACT—Divisible - - - - - 235
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— Illegality—Concealment - - - - - 469
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— Statute of Frauds - - - - - 70, 467
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CONTRACT—*continued.*

—“Subject to approval”—Abandonment—
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CONTRIBUTORY - - - - - 126, 334, 464

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COPYRIGHT—*Design—Agreement for Sale—Exclusive Right to sell Manufactured Article—Registration—Proprietor—Assignment of License not in Writing*—5 & 6 Vict. c. 100, s. 6.] A partial assignment of, or license to use, a design under sect. 6 of the Act 5 & 6 Vict. c. 100, must be in writing, and can only be made by a registered proprietor.—By a verbal contract made in July, 1877, C., an American manufacturer, purported to sell to the Plaintiff the exclusive right to sell in *England* an article newly designed and then about to be manufactured, and also to obtain such protection for the same as he could do under English law, it being stipulated that the Plaintiff should obtain the article exclusively from C.: by the same contract C. agreed to sell to the Plaintiff the first twenty cases of the article for the price agreed upon, which was to cover both the right and the goods. In September, 1877, the cases were delivered in *England* to the Plaintiff, who paid the money due under the contract. Meanwhile, in August, 1877, the Plaintiff had obtained registration of the design under 5 & 6 Vict. c. 100, and the copyright therein was granted to him for the term of three years. In an action to restrain the alleged infringement by the Defendant of the Plaintiff's copyright:—*Held*, on the evidence, that the Plaintiff had not acquired under the contract the right to apply the design to a manufactured article, so as to entitle him to register it in his own name under the Act:—*Held*, also, that the Plaintiff's right (if any) to protection could not have accrued till the completion of the purchase. *Jewitt v. Eckhardt* - - - - - 404

CORPUS—Charge on—Annuity - - - - - 411
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COSTS—Action for violation of trade-mark—Lien
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—Bankruptcy—Shorthand notes - - - - - 599
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COVENANT—Not to engage in business—Partnership articles - - - - - 345
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CREDITORS' DEED—Communication to creditors—Trust - - - - - 744
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CUSTOM—System of hiring—Order and disposition - - - - - 601
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DAMAGES—Action in tort—Undischarged bankrupt - - - - - 364
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DEPOSIT OF DEEDS—Equitable mortgage—Right of sale or foreclosure - - - - - 444
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DIRECTOR—Liability of - - - - - 388
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DISSOLVED COMPANY—Petition to wind up
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DISTRESS—Winding-up - - - - - 616
See COMPANY. 5.

DISTRIBUTIONS—Statute of - - - - - 136
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DISTRICT CHURCH—Mortgage of pew rents 96
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ELECTION—Proof in bankruptcy—Joint and separate estate - - - - - 807
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ELEEMOSYNARY CORPORATION - - - - - 709
See LIMITATIONS, STATUTE OF.

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See CHARITY. 3, 4.

ENJOYMENT IN SPECIE - - - - - 101
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EQUITABLE MORTGAGE—Deposit of deeds—Foreclosure or sale - - - - - 444
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EQUITY TO A SETTLEMENT—Married woman
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EXECUTION CREDITOR—Bankruptcy - - - - - 596
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EXECUTOR—Assent to legacy - - - - - 777
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- FALSA DEMONSTRATIO** - - - 758
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- FAMILY**—Gift to - - - 540
See WILL. 3.
- FIDUCIARY CHARACTER**—Agent making a profit - - - 286
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- FINES**—Renewable lease - - - 357
See RENEWABLE LEASE.
- FORECLOSURE** - - - 147, 444
See MORTGAGE. 1, 2.
- FOREIGN TRIBUNAL**—Arbitration clause 26
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- FORMA PAUPERIS**—Court fees - - 518
See PRACTICE. 8.
- FRAUD**—Debt—Protection of debtor - 825
See BANKRUPTCY. 5.
 — Debt—Proof in bankruptcy - - 807
See BANKRUPTCY. 14.
- FRAUDS, STATUTE OF**—*Contract by Letters—Acceptance—Reference to formal Contract.* The Defendant placed a leasehold property in the hands of a house agent for sale. The Plaintiff wrote to the agent, "In reference to J.'s property in *Fleet Street*, I think £800 for the lease, fixtures, &c., is about what I should be willing to give. Possession to be given me within fourteen days from date. This offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction." Shortly afterwards the agent wrote back, "We are instructed to accept your offer of £800 for these premises, and have asked J.'s solicitor to prepare contract." The required modification in the lease was procured:—*Held*, by Fry, J., and by the Court of Appeal, that, notwithstanding the reference to a future contract, the two letters constituted a complete contract.—*Rossiter v. Miller* (5 Ch. D. 648) distinguished. **BONNEWELL v. JENKINS** C. A. 70
2. — *Vendor and Purchaser—Specific Performance—Sale by Auction—Conditions of Sale, Omission of Reference to, in Auctioneer's Book.* At a sale by auction subject to conditions, the auctioneer entered in his sale book the names of the vendor and purchaser, the subject-matter of the sale, and the amount of the purchase-money, but omitted, in the entry, to embody or make any reference to the conditions of sale. There was no other memorandum or contract in writing:—*Held*, that there was no sufficient contract in writing within the *Statute of Frauds*, and specific performance refused as against the purchaser. **RISH-TON v. WHATMORE** - - - 467
- FRAUDULENT IMITATION** - - - 606
See TRADE-MARK. 3.
- FREEHOLD ESTATE**—Residuary gift - 561
See WILL. 6.
- FUND IN COURT**—Jurisdiction to enforce compromise - - - 658
See JURISDICTION.
- GAMING**—Proof for debt in bankruptcy - 754
See BANKRUPTCY. 17.
- GARNISHEE**—Bankruptcy—Secured creditor *See BANKRUPTCY. 19.* [327]
- GUARDIAN** - - - 1
See LANCASTER COURT. 1.
- GUARDIAN OF POOR**—Pauper lunatic—Claim for maintenance - - - 256
See LUNATIC.
- HOTCHPOT**—Advancement - - - 136
See ADVANCEMENT.
- HUSBAND AND WIFE**—*Married Woman—Separate Use—Restraint upon Anticipation—Bequest of Share of Residue.* Testatrix bequeathed to a married woman by name, describing her as married, a reversionary share of a fund of mixed real and personal estate, expectant on a life interest. The will declared that every gift thereby made to a married woman should be for her separate use, without power of anticipation, and that her receipts alone should be good discharges for the same. The tenant for life died in the lifetime of the testatrix, who nevertheless did not alter her will.—The married woman's share of the residue being now represented by a sum of cash standing in Court, uninvested, upon petition by the married woman to have the cash paid out to her, upon her separate receipt:—*Held*, that she was so entitled.—*In re Ellis' Trusts* (Law Rep. 17 Eq. 409) observed upon. *In re CROUGHTON'S TRUSTS* - - - 460
2. — *Married Woman—Equity to Settlement—Life Interest.* A married woman has the same equity to a settlement out of property in which she has a life interest only as out of property in which she has an absolute interest, and there ought to be no distinction between the two cases as regards the amount to be settled. **TAUNTON v. MORRIS** - - - 453
 — Next friend - - - 591
See PRACTICE. 9.
- ILLEGALITY**—Contract—Concealment - 469
See PRINCIPAL AND SURETY.
 — Divisible contract partly illegal - 230
See SPECIFIC PERFORMANCE.
 — Proof for gaming debt - - - 754
See BANKRUPTCY. 17.
 — Room let for illegal purpose - - 39
See LANDLORD AND TENANT.
- IMPLICATION**—Devise—Revocation - 558
See WILL. 7.
 — Right of way - - - 415
See WAY.
- INCOME**—Annuity—Charge - - - 411
See ANNUITY.
- INFANT**—Agreement to settle - - - 318
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 — Jurisdiction of County Court—Palatine of Lancaster - - - 1
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- INTERLOCUTORY ORDER**—Appeal—Order overruling demurrer - - - 318
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- INTERROGATORIES**—Irrelevancy - - 645
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- INVESTMENT**—Trust money—Leaseholds 492
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INVESTMENT—*continued.*

- Trustee—Direction in will - - - 591
See TRUSTEE. 3.

- JOINT AND SEPARATE ESTATE** - - - 11, 807
See BANKRUPTCY. 14, 15.

- JOINT OWNERSHIP**—Bankruptcy—Order and disposition - - - 218
See BANKRUPTCY. 2.

- JUDGMENT**—Against company—Winding-up order - - - 183
See COMPANY. 6.

JURISDICTION—*Enforcing Compromise of Action—Fund set apart to abide Result of Action.*] *S.* commenced an action in the Common Pleas Division against *D.*, to recover a commission claimed for services in obtaining payment of a sum from a foreign government. This sum was being administered in the Chancery Division, and *S.* commenced an action in that Division to establish a lien on *D.*'s interest, and to prevent the fund from being paid away. In this action an order was made for a sum of £5000 to be set apart in the joint names of the solicitors of the Plaintiff and Defendant to answer the Plaintiff's claim, and all further proceedings were stayed until after the trial of the action in the Common Pleas Division, and general liberty to apply was given. Shortly after this the solicitors of the Plaintiff and Defendant, by the authority of their clients, came to a definite arrangement by letter as to the amount of the Plaintiff's claim. The Plaintiff then applied for directions that this amount might be paid to him out of the fund set apart:—*Held*, by *Malins, V.C.*, that the Court had no authority to make such an order, as it would thereby be enforcing a compromise of an action in the Common Pleas Division, but *held* on appeal, that the Court had jurisdiction to make the order. *SCULLY v. LORD DUNDONALD* - - - **C. A. 658**

- Bankruptcy Court—Recovering debt due from third party - - - 377
See BANKRUPTCY. 10.

- County Palatine Court - - - 1, 150
See LANCASTER COURT. 1, 2.

LANCASTER COURT—*Infant—Guardianship and Maintenance—Court of County Palatine—Concurrent Jurisdiction.*] In 1874, a petition was presented in the Court of the County Palatine of Lancaster for a guardian and maintenance to two infants, who were entitled for life to a very large property under their great-grandfather's will. Their mother and another person were appointed guardians, and an allowance for maintenance was fixed, and was afterwards varied from time to time by the Court. In 1877, the mother, as next friend of the infants, obtained in the High Court a judgment for administration of the testator's estate, and then took out a summons in the action for the appointment of guardians and an allowance for maintenance. This summons was not served on the other guardian, but he heard of it, and by the direction of the Vice-Chancellor of the County Palatine took out a summons for directions in the Palatine Court. On the summons being attended, the Vice-Chancellor expressed strong disapprobation of the conduct of the mother in taking out

LANCASTER COURT—*continued.*

the summons in the High Court, took an undertaking, which she voluntarily offered, not to proceed further with the summons in the High Court, and made a reference to the Registrar as to revising the allowances for maintenance. Soon afterwards, the mother, as next friend of the infants, applied to the Vice-Chancellor of the County Palatine to discharge the undertaking and to stay proceedings in the Palatine Court. This application having been refused, the mother, as next friend of the infants, appealed:—*Held*, that, although the High Court had full jurisdiction to appoint guardians and order maintenance, notwithstanding the previous orders made by the Palatine Court, such jurisdiction ought not to be exercised unless some special ground was shewn, inasmuch as it was better for the infants that their maintenance and education should remain under the direction of the Judge who had directed them for three years, and was fully acquainted with the case; and that the proceedings in the Palatine Court ought not to be stayed:—*But held*, that, as the Vice-Chancellor of the County Palatine had no jurisdiction to grant an injunction to restrain proceedings in the High Court, he ought not to have taken an undertaking to discontinue them, and the undertaking was accordingly discharged. *In re ALISON'S TRUSTS AND In re JOHNSONS, INFANTS* - - - **C. A. 1**

2. — *Jurisdiction—Person within but Property beyond Local Limits—Chancery Jurisdiction in Personam—Court of Chancery of Lancaster Act, 1854, s. 7—Judicature Act, 1873, s. 18, sub-s. 2.*] The principle under which the jurisdiction *in personam* of the old Court of Chancery extends, in effect, to property wherever situate, applies to the Chancery Court of the County Palatine of Lancaster.—Thus, where the Defendants in an action in the Chancery Court of the County Palatine of Lancaster were within but their property was beyond the boundary of the local jurisdiction, it was *held* that the jurisdiction of that Court was the jurisdiction *in personam* of the old Court of Chancery within the boundary, and therefore that the Palatine Court could exercise jurisdiction over the property, and could enforce any order in the action by applying to the Supreme Court under the *Court of Chancery of Lancaster Act, 1854, s. 7*, and *Judicature Act, 1873, s. 18, sub-s. 2*.—Motion by the Defendants to stay the action for want of jurisdiction refused with costs. *In re LONGDEN DALE COTTON SPINNING COMPANY* - - - **C. A. 150**

LANDLORD AND TENANT—*Quiet Enjoyment—Premises let for Purpose subsequently made illegal—Warranty of Legality—Eviction—Practice—Amendment.*] The Defendant let the basement of a store to the Plaintiff "with full and undisturbed right and liberty to store cartridges therein," and covenanted to keep the premises in proper repair and condition, so as to be available for storing cartridges, and covenanted for quiet enjoyment. Other parts of the store were at that time let to other persons for storing gunpowder. Soon afterwards the *Explosives Act, 1875*, passed, making it illegal to store cartridges and gunpowder in the same building. The Defendant, upon the Act coming into operation, removed the

LANDLORD AND TENANT—continued.

Plaintiff's cartridges out of the building. A correspondence ensued, and the Defendant stated to the Plaintiff that the basement was at the Plaintiff's disposal, but that if the Plaintiff stored cartridges there the Defendant must, to protect himself from liability, give notice to the authorities. The Plaintiff thereupon commenced his action to restrain the Defendant from obstructing the storing of his cartridges, and to compel the Defendant to do everything necessary to enable the Plaintiff to store them there, and for damages:—*Held*, by *Fry, J.*, that the Plaintiff was entitled to damages for the loss of the use of the demised premises, on the ground that the Defendant's acts amounted to eviction.—*Held*, by the Court of Appeal, that judgment must be entered for the Defendant, for that, 1, there had been no eviction, the removal of the Plaintiff's cartridges being only a trespass; and, 2, there had been no breach of covenant by the Defendant, for that the covenant to keep the premises in proper condition for storing cartridges only referred to their physical condition; and that the grant of liberty to store cartridges there did not import a warranty of the legality of so storing them, nor did anything in the lease bind the Defendant to procure licenses to make the storage legal.—*See*, an amendment converting a claim on the footing of a subsisting lease into a claim on the footing of eviction ought not to be allowed. *NEWBY v. SHARPE* C. A. 39

— Bankruptcy of tenant—Non-payment of rent by trustee - - - 731

See BANKRUPTCY. 12.

— Distress—Winding-up of company - 616

See COMPANY. 5.

— Implied right of way for tenant - 415

See WAY.

— Waste - - - 521

See WASTE.

LEASE—Charity void under 13 Eliz. c. 10 709

See LIMITATIONS, STATUTE OF.

— Partnership—Renewal - - - 129

See PARTNERSHIP. 3.

— Renewal fines - - - 357

See RENEWABLE LEASE.

LEGACY—Charitable - - - 584

See CHARITY. 1.

LEGAL ESTATE—Commensurate with equitable interest - - - 736

See WILL. 1.

LETTERS—Contract by - - - 70

See FRAUDS, STATUTE OF. 1.

LICENSE—Copyright—Not in writing - 404

See COPYRIGHT.

LIEN—Solicitor - - - 479

See SOLICITOR.

— Wharfinger—Costs of action for violation of trade-mark - - - 372

See TRADE-MARK. 1.

LIMITATIONS, STATUTE OF—Charity—Voidable Lease—13 Eliz. c. 10, s. 3—Eleemosynary Corporation—Presumption of Possession under Rightful Title—Counterpart of Lease—Evidence.] In the year 1783 the Governors of *Magdalen Hospital*, a charitable society incorporated in 1768 granted a

LIMITATIONS, STATUTE OF—continued.

lease of property belonging to the hospital for ninety-nine years to a lessee at a peppercorn rent. In 1876 the governors of the hospital brought an action against the Defendants, who were then in possession of the land, asking for a declaration that the lease was void under the 13 Eliz. c. 10, s. 3, and to be put into possession of the property.

No proof was given by the Plaintiffs that the Defendants claimed their title to the land under the lease:—*Held* (affirming the decision of *Fry, J.*), that the counterpart of the lease produced by the Plaintiffs was evidence against the Defendants of the execution of the lease, and that the Plaintiffs were owners of the freehold of the land; and that in the absence of proof that the Defendants claimed under any other title, there was a presumption that their title was derived under the lease:—*Held*, also, that the hospital, although an eleemosynary and not an ecclesiastical corporation, was within the statute 13 Eliz. c. 10, and that the lease was voidable under the 3rd section:—But *held*, that the right of action to recover possession of the land accrued to the governors of the hospital at the date of the execution of the lease, and that the action was now barred by the *Statute of Limitations*.—*Governors of Magdalen Hospital v. Knotts* (on demurrer) (5 Ch. D. 175) reversed. *GOVERNORS OF MAGDALEN HOSPITAL v. KNOTTS* - - - C. A. 709

LIQUIDATION - - - 596, 601, 731

See BANKRUPTCY. 9, 11, 12.

LUNATIC—Maintenance of Pauper Lunatic—Jurisdiction—Payment to Legal Personal Representative of Lunatic—16 & 17 Vict. c. 97, ss. 94, 104.] *M.*, a pauper lunatic in an asylum at *Bethnal Green*, but not found lunatic by inquisition, became entitled to a small fund in Court. An order was made in 1856 on petition under the *Trustee Relief Act*, by *M.* by his next friend, directing that he should continue at the asylum until further order, and the guardians of the poor of his parish undertaking to maintain him there, that £31 a year should be raised out of the fund and paid to the guardians in repayment of the sums to be expended in his maintenance. In 1859 he was removed to the new asylum for his county by order of the justices, but without any order of the Court of Chancery. From this time no payments were applied for by the guardians. He remained in the County Asylum till his death in 1875. His legal personal representative petitioned for transfer of the funds in Court to him. The guardians appeared and claimed maintenance for the past time:—*Held*, that the guardians could not claim maintenance under the order, which ceased to be operative on the lunatic's removal to a fresh asylum:—*Held*, also, that any claim for maintenance independently of the order was merely a debt of the lunatic, payable by his personal representative in due course of administration, and that the Court had no jurisdiction in the matter to order payment of it, but that the whole fund must go to the personal representative. *In re MARMAN'S TRUSTS* - - - C. A. 256

MAINTENANCE OF LUNATIC—Pauper - 256

See LUNATIC.

MARRIAGE SETTLEMENT—Post-nuptial 318
See VOLUNTARY SETTLEMENT.

MINE—Slate quarry—Waste - - - 521
See WASTE.

MISTAKE—Will—Occupation and situation of land - - - 758
See WILL. 13.

MORTGAGE—*Equitable—Right to Foreclosure, not Sale.*] The right of an equitable mortgagee by deposit of deeds without a written memorandum is a decree of foreclosure, not sale. *BACKHOUSE v. CHARLTON* - - - 444

2. — *Foreclosure—Mortgagor's Estate in Infant Heir-at-Law—Form of Decree.*] In a foreclosure action, where the estate of the mortgagor was devised in trust for sale and had become vested in an infant, who was also one of the persons beneficially interested:—*Held*, that the decree should contain a direction that, in case the mortgagees were not redeemed within six months, the infant should be a trustee for them within the meaning of the *Trustee Act*, and the executrix of the mortgagor be ordered to convey the estate to the mortgagees on his behalf. *FOSTER v. PARKER* - - - 147

3. — *Power of Sale—Trust of surplus Sale Moneys—Inconsistency between Reservation of Equity of Redemption and Trust of surplus Sale Moneys—Resulting Trust—Conversion—Real and Personal Representatives.*] By a marriage settlement land of the husband was conveyed, "for making a provision" for the wife and the issue of the intended marriage, to such uses as the husband and wife should during their joint lives by deed appoint, remainder to the use of the husband for life, remainder to the use of the wife for life, remainder to the use of the children of the marriage as the husband and wife should by deed jointly appoint, or as the survivor should by deed or will appoint, and, in default of appointment, to the use of the children in equal shares as tenants in common in fee, and, if but one child, to the use of that one child in fee, with an ultimate remainder in default of children to the use of the heirs and assigns of the husband. There was a proviso that the grantees to uses and the survivor of them, and the executors and administrators of the survivor, their or his assigns, should, after the death of the survivor of the husband and wife, and during the respective minorities of any of their children, receive the rents of the share of such child or children, and should, after providing for his, her, or their maintenance and education, invest the surplus (if any) as therein mentioned, and accumulate the same in trust for the persons who should ultimately become absolutely entitled to the shares from which the same should have proceeded. No money fund (other than these accumulations) was included in the settlement, and it contained no power of sale. Some years after the solemnization of the marriage the husband and wife mortgaged the property. The mortgage deed contained a recital of the settlement, and a recital that the husband and wife had requested the mortgagee to lend them £600 on the security of the property, which he had agreed to do, but it contained no other recital, and by it the husband and wife, in exercise of their joint power,

MORTGAGE—*continued.*

appointed the property to the use of the mortgagee in fee, but subject to a proviso for redemption on payment of the mortgage money. The proviso was for reconveyance of the property to the uses of the settlement. The mortgage contained a power for the mortgagee to sell the property, and a declaration that, in case the property or any part of it should be sold under the power, the mortgagee should, after paying the expenses of sale and the principal and interest due upon the mortgage, pay over the surplus (if any) to the husband, his heirs, executors, administrators, or assigns. After the death of the husband the mortgagee sold the whole of the property, and, after payment of expenses and the mortgage debt and interest, there remained a surplus in his hands:—*Held*, that there was no resulting trust of the surplus, but that the husband's personal representative was entitled to it as part of his personal estate. *JONES v. DAVIES* - - - 205

4. — *Practice—Mortgagee in Possession—"Usual Account"—Proceeds of Sale—"Wilful Default"—Form of Judgment.*] In an action for account by a mortgagor against a mortgagee in possession who has sold, the mortgagor is entitled to an account of the proceeds of sale received by the mortgagee or by his order or for his use, "or which without his wilful default might have been so received," although wilful default may not have been charged in the pleadings and proved at the trial; but such an account does not entitle the mortgagor to question the propriety of the sale or the adequacy of the amount for which the property has been sold.—*Job v. Job* (6 Ch. D. 562) explained. *MAYER v. MURRAY* - - - 424

5. — *Punctual Payment—Calling in—Acceptance of Interest—Waiver.*] A mortgagee agreed with the mortgagor that if the interest was duly and punctually paid the principal should remain for two years. Six months' interest became due and was demanded but was not paid; and the mortgagee then demanded payment of principal and interest. Three days afterwards the mortgagor paid the six months' interest, which was received by the mortgagee:—*Held*, that the mortgagee had not thereby, nor by a subsequent unaccepted offer to receive an instalment, waived his right to call in the principal.—*Langridge v. Payne* (2 J. & H. 423) observed upon. *KEENE v. BISCOE* - - - 201
— *Pew rents* - - - 96
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— To third party—Order XVI., r. 17 - 457
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OBSTRUCTION—Way - - - 415
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ORDER AND DISPOSITION 11, 218, 519, 601
 See BANKRUPTCY. 2, 3, 11, 15.

ORIGINAL OR SUBSTITUTED GIFT - 60
 See WILL. 2.

PAID-UP SHARES—Allotment for services 126
 See COMPANY. 8.

PARTIES—Action against one of several trustees
 See TRUSTEE. 1. [777]

— Next friend—Married woman - 591
 See PRACTICE. 9.

— Notice to third party - - - 457
 See PRACTICE. 10.

— Partition action - - - 451
 See PARTITION. 2.

PARTITION—Partition Act (31 & 32 Vict. c. 40), ss. 3, 4, 5—Some Parties desiring a Sale—Offer by others to purchase.] In a partition suit the Plaintiffs, who were entitled to three-sixteenths of the property, desired a sale by auction, alleging that by no other means could the value of this particular property be ascertained. The defendants, who were entitled to the remaining thirteen-sixteenths, objected to a sale, and offered to purchase the three-sixteenths:—*Held*, that the case came within the 5th section of the *Partition Act*, 1868, although it satisfied the conditions of the 3rd section, and upon some of the Defendants undertaking to purchase, a valuation was directed to be made in Chambers, and sale and purchase accordingly.—*Drinkwater v. Hatchliffe* (Law Rep. 20 Eq. 528) discussed. GILBERT V. SMITH - 548

2. — *Trustees for Sale—Cestuis que Trust not necessary Parties.]* In an action for sale and partition, the Plaintiffs were trustees for sale of two-thirds of certain leasehold property, and the Defendants were trustees for sale of the remaining third part after the death of a tenant for life. The *cestuis que trust* not being parties:—*Held*, that the trustees for sale sufficiently represented their *cestuis que trust*, and a sale and partition were directed without notice to the parties beneficially interested. STACE V. GAGE - 451

PARTNERSHIP—Bankers—Partnership Accounts—Accounts of individual Partners.] Where accounts are kept at a bankers by a firm, each partner having a right to draw cheques, and also by the individual partners of the firm, it is not the duty of the bankers to inquire into the propriety of any transfer of funds which may be made from and to the different accounts.—Upon the death of one partner in a firm having an account at a bankers, the surviving partner has a right to draw cheques upon the partnership account. BACKHOUSE V. CHARLTON - 444

2. — *Covenant not to engage in any Business except upon the Account and for the Benefit of the Partnership—Remedy for Breach of Covenant—Action for Account of Profits and claiming other Business as Assets of the Partnership.]* The Plaintiffs and Defendant, being partners as salt mer-

PARTNERSHIP—continued.

chants and brokers, mutually covenanted by the partnership articles to diligently employ themselves in the partnership business, and “not to engage, directly or indirectly, in any business except upon the account and for the benefit of the partnership.”—After the expiration of the partnership by effluxion of time, the Plaintiffs discovered that during the partnership the Defendant had been engaged in another business as a salt manufacturer in which he had made profits.—A bill filed by the Plaintiffs to compel the Defendant to account to the partnership for such profits was dismissed without costs; and an action by the Plaintiffs claiming that the Defendant’s interest in the other business formed part of the partnership assets was dismissed with costs.—The decision of the Master of the Rolls affirmed. DEAN V. MACDOWELL - C. A. 345

3. — *Expiration of Lease of Place of Business—Renewal of Lease.]* C. and N. entered into partnership for twenty-one years as ironmongers under articles which provided that the business should be carried on for twenty-one years at the G. R. premises, or “in such other place or places as the partners may agree upon.” Afterwards the partners agreed to add to their business that of ironfounders, and took for that purpose the G. Q. works. The lease of these works expired during the partnership, and C. declined to concur in a renewed lease. N. thereupon took a renewed lease of them in his own name, and insisted on his right to continue to carry on the ironfoundry business there on account of the partnership:—*Held*, that as the partnership business could only be carried on in such place as the partners agreed upon, if they did not agree upon a place it could not be carried on at all, and that one partner, in the absence of express powers for that purpose, could not, without the consent of the other, although the partnership was to continue for a definite term, renew on account of the partnership a lease of the property on which the business had been carried on:—*Held*, therefore, that C. was entitled to an injunction to restrain N. from employing the assets or pledging the credit of the partnership in carrying on business at the G. Q. works. CLEMENTS V. NORRIS - C. A. 129

PARTNERSHIP—Arbitration clause - 26
 See ARBITRATION.

— Bankruptcy - - - 11, 218, 807
 See BANKRUPTCY. 2, 14, 15.

PAST MEMBERS - - - 334
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PAUPER LUNATIC - - - 256
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PAYMENT INTO COURT - - 84, 148
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 See PRACTICE. 13.

PETITION—Winding-up - - 75, 464
 See COMPANY. 9, 10.

PEW RENTS—Mortgage of—Validity - 96
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PLEADING - - - 569
 See PRACTICE. 6.

POLICY OF INSURANCE—Bankruptcy—Order and disposition - - - 519
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 — Request of life interest in - - - 101
See WILL. 8.

POST-NUPITAL SETTLEMENT—Agreement by infant - - - 318
See VOLUNTARY SETTLEMENT.

POWER OF SALE - - - 205
See MORTGAGE. 3.

PRACTICE—*Appeal*—*Demurrer*—*Rules of Court*, 1875, *Order LVIII.*, r. 15.] An order overruling a demurrer is not an interlocutory order within Rules of Court, 1875, *Order LVIII.*, r. 15. *TROWELL v. SHENTON* - - - **C. A. 318**

2. — *Appeal for Costs*—*Judicature Act*, 1873, ss. 19, 49—*Rules of Court*, 1875, *Order LV.*—*Further Evidence on Appeal*—*Order LVIII.*, r. 5—*Investment of Trust Money on Leaseholds*—*Costs of Suit*.] A mortgagee of a share of the proceeds of a real estate devised in trust to sell and to invest the proceeds in government or real securities commenced an action against the mortgagor and the trustee of the will, alleging that the money had been invested upon improper securities. An order was made directing accounts and inquiries, and reserving further consideration. Shortly afterwards the trustee paid into Court the amount of the mortgaged share, and paid to the other beneficiaries their shares. The certificate found these payments, and as to the mode of investment stated simply that the money had been invested on mortgage of leaseholds. On further consideration the Plaintiff did not give notice to read the evidence used in Chambers. *Hall*, V.C., declined to hear the evidence taken in Chambers, *held* that on the finding in the certificate the investment was not shewn to be improper, and that the action was unnecessary, and made an order giving the trustee his costs, and costs, charges, and expenses out of the fund in Court:—*Held*, by the Court of Appeal,—1. That as the order gave the trustee costs, charges, and expenses, not being costs of suit, it was not simply an order as to costs within the discretion of the Court, and was subject to appeal:—2. That the case was one where leave to adduce further evidence on the appeal ought to be given, so as to bring before the Court full information as to the nature of the investments:—3. That under a trust to invest in real securities an investment on mortgage of leaseholds is improper, unless the leaseholds are for a long term of years at a peppercorn rent without onerous covenants:—4. That the order of the Vice-Chancellor as to costs being made on the ground, which was established, that the fund never had been, nor had been believed by the Plaintiff to be, in danger, and that the action was therefore unnecessary and improper, ought not to be interfered with; and that as the other beneficiaries had had no benefit from the action, the costs were properly payable out of the Plaintiff's share. *In re CHENNELL. JONES v. CHENNELL* - - - **C. A. 492**

3. — *Appeal*—*Extension of Time to appeal*—*Rules of Court*, 1875, *Order LVIII.*, r. 15.] A contributory, on the 29th of March, being twenty-one days from the pronouncing of a refusal to

PRACTICE—*continued*.

remove his name from the list, gave fourteen days' notice of appeal. On the 1st of April, conceiving that he ought to have given only a four days' notice, he withdrew his notice of appeal, and on the following day gave a four-days' notice of appeal. On the hearing of the appeal, the objection was taken that it was too late:—*Held*, that the time ought to be extended. *In re AMBROSE LAKE TIN AND COPPER COMPANY. TAYLOR'S CASE* - - - **C. A. 643**

4. — *Appeal*—*Notice of Appeal*—*Rules of Court*, 1875, *Order LVIII.*, rr. 2, 4.] A person against whom an order in a winding-up had been made for payment of money to the official liquidator served on the official liquidator a notice: "Take notice that it is the intention of J. L. to prosecute an appeal from the order made in this matter by His Honour the Vice-Warden of the Stannaries on the 29th of May, 1878, whereby the said J. L. was ordered," &c.:—*Held*, that this notice was sufficient, and the appeal was ordered to be set down. *In re WEST JEWELL TIN MINING COMPANY. LITTLE'S CASE* - - - **C. A. 806**

5. — *Costs*—*Administration Suit*—*Change of Solicitor*—*Solicitor's Lien*—*Set-off*.] In an administration suit a decree was made against a Defendant, and he was ordered to pay the costs. He changed his solicitor, and subsequently thereto a motion by the Plaintiffs for leave to issue an attachment for disobedience to the decree and order was refused with costs:—*Held*, that the Plaintiffs had a right to set off. *ROBERTS v. BUÉE* - - - **198**

6. — *Counter-claim*—*Pleading*—*Rules of Court*, 1875, *Order XXII.*, r. 9.] To an action by executors for the purpose of charging a married woman's separate estate with a debt to their testator contracted on the faith of such separate estate, the husband, who had been made a Defendant, and his wife raised a counter-claim for money belonging to the wife, not part of her separate estate, and for certain chattels in the possession of the testator at his death, which it was alleged were the property of the husband:—*Held*, on motion under Rules of Court, 1875, *Order XXII.*, rule 9, that the claim to the chattels and money was a proper subject of counter-claim. *HODSON v. MOCHI* - - - **569**

7. — *Evidence*—*Agreement to take Evidence by Affidavit*—*Trial without a Jury*—*Rules of Court*, 1875, *Order XXXVI.*, r. 26; *Order XXXVII.*, r. 1.] Where the parties to an action agreed that evidence should be taken by affidavit:—*Held*, by *Malins*, V.C., that this was equivalent to an agreement that the action should be tried before a Judge without a jury, since affidavits could not otherwise be used except under special circumstances; and the Court refused to direct a trial before a Judge and jury, even in a case peculiarly adapted to be tried before a jury, where the parties had under such an agreement taken affidavit evidence for two years, and had at great expense prepared the action for trial before a Judge alone. —On appeal the order of the Vice-Chancellor was affirmed. *BROOKE v. WIGG* - - - **C. A. 510**

8. — *Forma Pauperis*—*Court Fees*.] Chief Clerk's certificate ordered to be delivered out

PRACTICE—continued.

without payment of Court fees, the Plaintiff since it was ready having obtained an order to sue *in formâ pauperis*. *THOMAS v. ELLIS* - - - 518

9. — *Next Friend—Defendant—Rules of Court, 1875, Order XVI., r. 8.* The name of a Defendant, who was also the next friend of the Plaintiffs, and whose wife was a Defendant, was struck out, and liberty was given to the wife to defend separately. *LEWIS v. NOBBS* - - - 591

10. — *Notice to Third Party—Rules of Court, 1875, Order XVI., r. 17.* The Plaintiffs had purchased property from the Defendant for £14,000, and they claimed in this action to have £2000, part thereof, returned to them.—The Defendant was being sued in the Exchequer Division by persons who claimed the same £2000 as commission moneys.—The Court refused to make an order that the Plaintiffs in the Exchequer Division should be served with a third party notice, or made Defendants to this action, under Rules of Court, 1875, Order XVI., r. 17. *ASSOCIATED HOME COMPANY v. WHICHCORD* - - - 457

11. — *Payment into Court after Decree—Admission—Evidence.* After a decree to take the accounts of a partnership the Chief Clerk directed that two accountants, one of whom was employed by the Plaintiff and the other by the Defendant in investigating the accounts for the purposes of the suit, should report on the accounts, shewing what items were undisputed and what were disputed, and verify their report by affidavit. The accountants verified an account shewing £541 due from the Defendant to the Plaintiff on the undisputed items, and verified also an account of disputed items. These were items of charge against the Defendant, so that, however they were decided upon, the £541 would not be reduced:—*Held*, that the £541 ought to be ordered into Court; for that, although no certificate had been made, the fact that £541 at least was due from the Defendant was ascertained with sufficient certainty to entitle the Plaintiff to have it ordered into Court:—*Held*, also, that under the circumstances of the present case the Defendant must be taken to have admitted by his agent that at least £541 would be found due from him.—The principles on which the Court acts in ordering payment into Court after a decree for an account, considered. *LONDON SYNDICATE v. LORD* **C. A. 84**

12. — *Payment into Court—Motion—Non-appearance of Defendant—Sufficient Admission.* In an administration action notice of motion was served upon a Defendant, an executor, for payment into Court of money, part of the testator's estate, which it was shewn by affidavit that he had received. The Defendant did not appear on the motion:—*Held*, that, the Defendant not having disputed the affidavit, there was a sufficient admission that the money was in his hands, and that he must be ordered to pay it into Court. *FREEMAN v. COX* - - - 148

13. — *Pending Litigation—Construction of Legal Devise.* A suit having been instituted just before the *Judicature Act* came into operation, to ascertain the construction of legal devises, an order was made at the trial that the cause should proceed under the new practice. *HOMER v. HOMER* - - - 758

PRACTICE—continued.

14. — *Striking out Interrogatories—Rules of Court, 1875, Order XXXI., r. 5—Interrogatories tending to criminate—Scandal—Irrelevancy.* An action having been brought to set aside a deed of gift made by a lady a few days before her death, on the ground that the instructions for it were given while she was in a state of stupor produced by large doses of a narcotic drug, the Plaintiff exhibited interrogatories, following out in detail the statements of the claim, with a view of shewing that the Defendant, who was the grantee in the deed of gift, had procured the drug for her and encouraged her to take it, in order to avail himself of the stupor which it produced to obtain the execution of the deed of gift. The Defendant moved to strike out the interrogatories as scandalous, irrelevant, and not put *bonâ fide* for the purposes of the action:—*Held*, by *Bacon, V.C.*, that the interrogatories inquired after matters amounting to an indictable offence, and must therefore be disallowed.—*Held*, on appeal, that supposing the matter inquired after to be an indictable offence, that was no reason for striking out an interrogatory, which, being relevant, was not scandalous; and that the remedy of the Defendant was to decline to answer, on the ground that his answer might tend to criminate him.—A party may decline to answer under Rules of Court, 1875, Order XXXI., rule 8, though he might have applied to have the interrogatory struck out under rule 5, and has not done. The doubt in *Saunders v. Jones* (7 Ch. D. 435) overruled.—The words "or on any other ground" in Order XXXI., rule 5, mean grounds *ejusdem generis* with those specified. *FISHER v. OWEN* - - - **C. A. 645**

— Mortgage suit—Redemption—Mortgagee in possession—Wilful default - - - 424
See MORTGAGE. 4.

— Partition Act - - - 451, 548
See PARTITION. 1, 2.

— Winding-up petition - - - 75
See COMPANY. 9.

PRECATORY TRUST - - - 540
See WILL. 3.

PREFERENTIAL DEBTS—Bankruptcy - 621
See BANKRUPTCY. 16.

PRINCIPAL AND AGENT—*Bankers—Credit Agency—Remittances to cover Advances—Appropriation—Discounting expected Remittances—Agents—Constructive Notice.* The Plaintiffs, bankers at *Lima*, established a credit agency with the *General Company in London*, and agreed to send remittances within ninety days to cover drafts. The *General Company*, being in difficulties, obtained an advance of money from the *Peruvian Bank*, to be repaid out of expected remittances from the *Lima Bank* to cover bills then current, and the *Peruvian Bank* employed as agents to receive and select from the expected securities, the managing director of the *General Company* and their own managing director, who had been, two years previously, the manager of the *General Company*, and was cognisant of and party to the arrangement with the *Lima Bank*. The securities were selected by and handed over to the *Peruvian Bank* upon their arrival, and the following day the *General Company* stopped payment

PRINCIPAL AND AGENT—continued.

and was wound up:—*Held*, that the *Lima Bank* had no title to recover the securities from the *Peruvian Bank*. *BANCO DE LIMA v. ANGLO-PERUVIAN BANK* - - - - - 160

2. — *Sub-Agent—Agent making a Profit by Sale to Himself—Acquiescence.*] The Plaintiff, in the year 1868, consigned a ship to *G. & Co.* in *China* for sale, fixing a minimum price of \$90,000, and requiring cash payment. *G. & Co.* employed the Defendant in *Japan* to sell the ship, with the same instructions. This was done with the knowledge and consent of the Plaintiff. The Defendant, having vainly attempted to sell the ship on the terms mentioned, took her himself for \$90,000, and about the same time resold her to a Japanese prince for \$160,000, payable as to \$75,000 in cash, and the rest on credit. The Plaintiff was not informed that the Defendant had purchased the vessel himself, or that he had resold it, till June, 1869, after the transaction was completed. The Defendant paid \$90,000 to *G. & Co.*, who remitted it to the Plaintiff, and eventually obtained the whole amount of \$160,000 from the Japanese prince. In 1873 the Plaintiff filed a bill in Chancery to compel the Defendant to account for the profit made by him in the resale of the ship:—*Held* (affirming the decision of *Hall, V.C.*), first, that the relation of agent and principal was established between the Defendant and the Plaintiff, and existed at the time of the purchase and resale of the ship by the Defendant, and that he was therefore liable to account to the Plaintiff for the profit made by him in the transaction:—Secondly: That there had been no such acquiescence or laches on the part of the Plaintiff as to disentitle him to relief.—Where a wrongful act has been completed without the knowledge or assent of the party injured, his right of action is not ordinarily barred by mere submission to the injury, or even by a voluntary promise not to seek redress; some conduct amounting to release or accord and satisfaction must be shewn; although, on account of laches, relief may be refused under special circumstances. *DE BUSSCHE v. ALT* - - - **C. A. 286**
— Bankruptcy of principal—Claim against agent—How enforced - - - 377
See BANKRUPTCY. 10.

PRINCIPAL AND SURETY—Contract—Concealment—Disclosure—Change of Circumstances—Illegal Contract—Interference of Court.] Where parties are contracting, either of them, unless he is under a duty to the other, may keep silence even as to facts which he believes would be operative on the mind of the other; if however one of them has made a statement which he believes to be true, but which in the course of the negotiation he discovers to be false, he is bound to correct his erroneous statement.—In some cases, such as contracts between solicitor and client, there is a duty to make entire disclosure. In others, such as contracts of partnership, everything material must be disclosed. There is no such duty in the case of a contract of suretyship, but nevertheless very little said which ought not to have been said, and very little omitted which ought to have been said, will suffice to avoid the contract.—The officers of a company, believing that the retention of money by one of their agents amounted to felony, directed

PRINCIPAL AND SURETY—continued.

his arrest. Certain friends of his came to the officers of the company and proposed to deposit a sum of money by way of security for any deficiency. On the same day the company was advised that the acts of the agent did not amount to felony, and the directions for the arrest were withdrawn. Later in that day the friends of the agent had a second interview with the officers of the company, and agreed to deposit a sum of money as security for his defaults, no mention being made of the withdrawal of the directions for the arrest. The sum of money was afterwards deposited with trustees on an agreement for the security of the company:—*Held*, that the change of circumstances ought to have been stated to the intending sureties, and that the agreement must be rescinded and the money returned to the sureties:—*Held*, that even if the agreement was illegal as compounding a felony, the Court would interfere in a case where the money was actually in the hands of trustees, and pressure had been exercised. *DAVIES v. LONDON AND PROVINCIAL MARINE INSURANCE COMPANY* - - - 469

PRIORITY—Administration—Action by creditor in different Divisions of Court - 154
See ADMINISTRATION.

— Winding-up of company—Execution creditor - - - 535
See COMPANY. 7.

PROOF—Bankruptcy - - - 621, 754, 807
See BANKRUPTCY. 14, 16, 17.

PROTECTED TRANSACTION—Bankruptcy 248,
See BANKRUPTCY. 6, 18. [367]

PROTECTION OF DEBTOR—Composition - 825
See BANKRUPTCY. 5.

PROTECTOR—Disentailing deed - - 628
See TENANT IN TAIL.

QUIET ENJOYMENT - - - 39
See LANDLORD AND TENANT.

RATIFICATION—Infant - - - 318
See VOLUNTARY SETTLEMENT.

REDEMPTION—Mortgagee in possession—Wilful default - - - 424
See MORTGAGE. 4.

REGISTRATION—Copyright in designs - 404
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— Resolution for composition - - 825
See BANKRUPTCY. 5.

— Trade-mark - - - 794
See TRADE-MARK. 2.

RENEWABLE LEASE—Fines for Renewal—Tenant for Life and Remainderman.] In 1838 property was demised for a term determinable on the dropping of three lives, reserving a yearly rent and a heriot payable on the dropping of each life, with a covenant for perpetual renewal at a specified fine on the dropping of each life. In 1869 the persons who had then become absolute owners subject to the lease settled the property in strict settlement, giving to a trustee ample powers of management, with powers to grant leases with or without covenants for renewal, and to perform any covenant for renewal previously entered into by any previous owner, or by the trustee for the

RENEWABLE LEASE—*continued*.

time being, so that in every such appointment, lease, or demise, the best rent be reserved without taking any fine or premium. During the continuance of a tenancy for life under this settlement two lives dropped, and on each occasion a heriot was paid and the lease renewed by the trustee at a fine in pursuance of the covenant:—*Held*, by *Bacon, V.C.*, that the fines and heriots ought to be treated as moneys arising under a power of sale and exchange, and to be invested in lands to be settled to the same uses.—*Held*, by the Court of Appeal, that the powers given to the trustee did not affect the question, and that the fines and heriots were casual profits payable to the tenant for life. *BRIGSTOCKE v. BRIGSTOCKE* - C. A. 357

RENEWAL—Lease of partnership property 129
See PARTNERSHIP. 3.

RENT—Distress—Winding-up - - - 616
See COMPANY. 5.

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See BANKRUPTCY. 12.

REPUTED OWNERSHIP - 11, 218, 519, 601
See BANKRUPTCY. 2, 3, 11, 15.

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RESIDUARY GIFT - - - 561, 789
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See PRACTICE. 9.

— r. 17 - - - 457
See PRACTICE. 10.

— Order XXII., r. 9 - - - 569
See PRACTICE. 6.

— Order XXXI., rr. 5, 8 - - - 645
See PRACTICE. 14.

— Order XXXVI., r. 26 - - - 510
See PRACTICE. 7.

— Order XXXVII., r. 1 - - - 510
See PRACTICE. 7.

— Order LI., r. 2 - - - 154
See ADMINISTRATION.

— Order LV., r. - - - 492
See PRACTICE. 2.

— Order LVIII., rr. 2, 4 - - - 806
See PRACTICE. 4.

— r. 5 - - - 492
See PRACTICE. 2.

— r. 15 - - - 318, 643
See PRACTICE. 1, 3.

SALE OF LAND - - - 177, 588, 670
See VENDOR AND PURCHASER. 1, 2, 3.

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— Partition Act - - - 548
See PARTITION. 1.

— Statute of Frauds - - - 70, 467
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SCANDAL—Interrogatories - - - 645
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See CHARITY. 2.

— Scheme—Transfer to School Board 543, 571
See CHARITY. 3, 4.

SECRET TRUST—Devise - - - 430
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SECURED CREDITOR - - - 327
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SECURITY—Passing by delivery—Breach of trust - - - 591
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SERVICE—Petition—Winding-up - - - 75
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SETTLEMENT—Post-nuptial - - - 318
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— Issue of - - - 635
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— Paid up—Allotment for services - - - 126
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SOLICITOR—*Charging Order*—23 & 24 Vict. c. 127, s. 28.] *B.* was in possession of real estate as trustee of a will under the trusts of which he was beneficially entitled to a share and the Plaintiff to another share. By deed of August, 1867, the Plaintiff conveyed her interest to *B.*, who made a mortgage of the property to *C.* After this the Plaintiff, having discovered early deeds under which she claimed to be tenant in tail of the whole estate by a title paramount to the will, filed a bill against *B.* and *C.* praying that the deed of August, 1867, might be set aside, that she might be declared entitled as tenant in tail, and that the mortgage, so far as it affected her interest, might be declared void. This bill was dismissed, and the dismissal was affirmed on appeal:—*Held*, by *Bacon, V.C.*, and by the Court of Appeal, that the whole property was preserved for the persons entitled under the will by the defence conducted by *B.*'s solicitor; and that the solicitor was entitled to a charging order for his costs upon the whole estate, and not merely upon *B.*'s beneficial interest in it. *BULLEY v. BULLEY* [C. A. 479

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SPECIFIC PERFORMANCE—Divisible Contract

—*Performance of Part—Agreement in part legal and in part illegal—Fraud—Ultra Vires.*] An action was brought by a company for the specific performance by the Defendant of an agreement which he had entered into to take 2000 £10 shares in the company, and pay for them in such numbers and at such times as should be required for the purposes of the company. His name had been placed on the register of shareholders, and a call had been made upon him which he refused to pay. Contemporaneously with the agreement to take the shares the board of directors had agreed with the Defendant to pay him £4000 in consideration of services rendered by him to the company. This sum was to be paid twelve months after the shares should have been paid for in full. The directors afterwards called on the Defendant to pay up the full amount of 1000 of his shares, which he refused to do. The Defendant alleged that the two agreements formed really only one contract for the issue of the shares at a discount; that he had not rendered any services to the company; and that the contract was divided into two parts for the express purpose of evading a provision of the company's articles of association which prohibited the directors from issuing shares at a price below par without the consent of a general meeting. No such consent had been given to the contract with the Defendant:—*Held*, that, as the Defendant had acted in collusion with the directors to defraud the company, he could not be heard to set up this fraud for the purpose of making invalid the agreement, which was *ex facie* valid, to take and pay for the shares:—That as the parties had contemplated a piecemeal performance of the one agreement, the Court could compel the performance of a part:—That, in the absence of any proof of *mala fides*, the resolution of the directors to call up the amount of the shares was conclusive evidence that the money was required for the purposes of the company.—Specific performance of the agreement to take and pay for the shares was accordingly decreed.—The decision of *Fry, J.*, affirmed. *ODESSA TRAMWAYS COMPANY v. MENDEL C. A. 235*

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TENANT IN TAIL—Disentailing Deed—Protector—Owner of Prior Estate—3 & 4 Will. 4, c. 74, ss. 22, 27, et seq.] In the 22nd section of the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), which points out the person who shall be protector of the settlement, the "owner of the prior estate" is the person who is entitled under the settlement to the beneficial enjoyment of the rents and profits.—In a will made before the passing of the Act the testator, being entitled to the equity of redemption of a freehold estate, devised the same to trustees and their heirs to the use of them and their heirs during the life of A. (a married woman), in trust for A. for her separate use, with remainder to the use of B. in tail, with remainders over. In 1871, the legal estate being still outstanding, the first tenant in tail, with the consent of A. as protector, disentailed the estate:—*Held* (affirming the decision of *Jessel, M.R.*), that the entail was effectually barred, A., and not the trustees, being the proper protector of the settlement. *In re DUDSON'S CONTRACT* C. A. 628

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TRADE-MARK—Infringement—Lien for Costs on the fraudulent Article—Lien of Wharfinger—Costs of Stakeholder.] A wine merchant brought an action against another wine merchant to restrain him from pirating his trade-mark by branding it on the corks of his bottles. Some of the wine in bottles with the pirated trade-mark was in the warehouse of certain wharfingers who were made Defendants to the action. In their

TRADE-MARK—continued.

defence they disclaimed all interest in the matter in dispute, and submitted to act as the Court might direct upon having their charges and costs paid. At the trial they contended at the Bar that the Plaintiff, if his right was established, ought not to touch the bottles for the purpose of removing the branded corks without first paying their charges:—*Held* (reversing the decision of *Fry, J.*), that the wharfingers had done nothing to disentitle them to their costs of the action; and that if the Plaintiff had any lien on the wine for his costs it must be postponed to the wharfingers' lien for their charges.—But, *quære*, whether the Plaintiff had any lien on the wine.—*Upmann v. Elkan* (Law Rep. 12 Eq. 140; *Ibid.* 7 Ch. 130) questioned. *MOET v. PICKERING* - - - C. A. 372

2. — *Registration—Committee of Experts—Distinction from other Trade-Marks—38 & 39 Vict. c. 91, s. 10—Trade-Marks Rules, 1876, rr. 58, 59, 62.]* When a label for cotton goods, which had been used as a trade-mark before the passing of the *Trade Marks Registration Act, 1875*, has been placed by the Committee of Experts, appointed under the 59th Rule of the Rules for Registration of Trade-Marks, in the second class, as not being a trade-mark as defined by the Act, the decision of the Committee is, in general, final; and a Judge of the Chancery Division ought not to order the registration of such label except under special circumstances; as, for instance, that the Committee have proceeded on a wrong principle.—The decision of *Hall, V.C.*, reversed. *In re ORR EWING'S TRADE-MARKS* - - - C. A. 794

3. — *Trade Designation—Title-page—Fraudulent Imitation.]* The Plaintiffs were the publishers of a work intitled "*Hemy's Royal Modern Tutor for the Pianoforte*," a revised edition of which had been brought out in 1867, and which was well known and had an extensive sale, but was not so registered as to secure copyright. In 1874 the Defendant employed *Hemy* to revise an old work, intitled "*Jousse's Royal Standard Pianoforte Tutor*," which had formerly been in high repute, but had entirely fallen into disuse. This revised work the Defendant brought out under the title, "*Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor*," the word "*Hemy's*," both on the outside of the book and on the title-page, being printed in much larger and more conspicuous type than any other of the words:—*Held*, by *Malins, V.C.*, and by the Court of Appeal, that the Plaintiffs were entitled to an injunction restraining the Defendant from offering his work for sale with its present form, title-page, and cover, or any other form, title-page, or cover, calculated to deceive persons into the belief that it was the Plaintiff's work. *METZLER v. WOOD* - - - C. A. 606

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TRUSTEE—Breach of Trust—Action by Cestui que Trust against Representatives of one only of several Trustees—Parties—Legacy—Presumption of Assent of Executors and Appropriation of Fund—Payment of Interest—Consolidated Orders of Court of Chancery, Order VII., r. 2.] A testator bequeathed the residue of his personal estate to three trustees, *R., L. and I.* (who were also his executors), upon trust to invest the same, and to pay the income to his widow for her life, and after her death "to lay out and invest or retain invested" £850, and to pay the income of £500, part thereof, to his daughter *M.* for her life, with remainder to her children, and upon trust to pay the income of the remaining £350 to his daughter *B.* for her life, with remainder to her children. And, in the event of the death of his daughter *M.* without issue, her share was to be divided among *L., I., and B.* The testator died in December, 1854, and his widow died in June, 1856. The daughter *M.* died in January, 1859, without issue. After the death of the widow *R.* began to pay interest to *B.* on £350, and after the death of *M.* on £516 13s. 4d. (i.e., on the £350 and one-third of the £500), and continued the payment half-yearly until his death, which took place in September, 1863. Part of the estate of the original testator consisted of a sum of £1200 lent upon mortgage. Before the death of *R.* £700, part of this sum, had been paid off by the mortgagor in instalments. For some of these instalments *R.* alone gave receipts, and he joined in the receipts for others. After *R.*'s death, *J.*, one of his executors, continued to pay interest to *B.* on £516 13s. 4d. until June, 1874, when the payment ceased. He made these payments with the knowledge of his co-executors and of the persons beneficially interested in *R.*'s estate, and the payments were admitted as proper deductions upon a half-yearly settlement of the accounts of the income of *R.*'s estate made between the executors and the beneficiaries. The £500 remaining due on the mortgage was paid off by instalments after the death of *R.*, the receipts for the instalments being signed by his executor *J.*, as "for the executors" or "for the trustees" of the original testator. *J.* paid one-third of the £500 to *L.*, and another third to *I.*, and retained the remaining one-third. In 1877 *B.* commenced an action against the executors of *R.* alone, claiming to have the sum of £516 13s. 4d. and the arrears of income made good out of the estate of *R.* :—*Held*, by *Fry, J.*, that, as *R.*'s executors could not properly have paid interest to *B.* after his death, unless the executors of the original testator had assented to the legacy and had set apart in the hands of *R.* a fund to meet it, it must be assumed that such an appropriation had been in fact made :—And, therefore, that *B.* was entitled to sue the executors of *R.* alone, without making the other trustees of the original testator parties. —And the executors of *R.*, admitting assets, were ordered to make good the £516 13s. 4d., with the arrears of income, out of his estate.—On appeal

TRUSTEE—continued.

the Defendants waived the objection as to want of parties, and the judgment of *Fry, J.*, was affirmed. *WILSON v. RHODES* - C. A. 777

2. — *Trust Deed for Creditors—Communication to Creditors.]* A man conveyed all his property to the Defendants upon trust to pay thereout a sum of £5000 which they were to raise on his behalf, and all other debts due from the assignor, including a debt due to the Plaintiff. The Defendants realized the property of the assignor, and alleged that they had paid some of the debts out of the proceeds. The Plaintiff brought an action against the Defendants asking for an account of the property, and that the debts of the Plaintiff and the other creditors might be satisfied thereout. The statement of claim contained no allegation that the assignment had been communicated to the Plaintiff. The Defendants demurred :—*Held* (reversing the decision of *Bacon, V.C.*), that the Defendants were not trustees for the Plaintiff, and that the demurrer must be allowed. —*Garrard v. Lord Lauderdale* (2 Russ. & My. 451) and *Acton v. Woodgate* (2 My. & K. 492) followed. *JOHNS v. JAMES* - C. A. 744

3. — *Will—Direction to Trustees to invest—Russian Railway and Egyptian Bonds—Trust Securities passing by Delivery—Defalcation—Liability of Trustees.]* A testator by will gave all his residue to trustees upon trust to invest in the parliamentary stocks or funds, or upon real securities; and the will contained a proviso that as often as the trustees should think it expedient so to do, they might sell out, transfer, or otherwise vary any of the trust moneys, funds, and securities, and invest the same in or on any other funds or securities whatsoever :—*Held*, that the sale of New £3 per Cent. Annuities and the investment of the proceeds in Russian railway and Egyptian bonds was authorized, and not a breach of trust.—Each of two trustees retained possession of a moiety of bonds held in trust, and which passed by delivery, and one trustee committed a breach of trust :—*Held*, that the other trustee was liable to make good the loss sustained. *LEWIS v. NOBBS* - - - - - 591

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VENDOR AND PURCHASER—Contract—Uncertainty—Agency.] The Defendant purchased an estate, having agreed with the Plaintiff that, if he made the purchase, he would cede part thereof to the Plaintiff.—There was some uncertainty in the memorandum of agreement between the Plaintiff and Defendant as to the exact portion which was to be ceded to the Plaintiff.—In an action by the Plaintiff for specific performance of the agreement,—The Court directed a reference to Chambers to ascertain what portion the Plaintiff was entitled to, and decreed that the Defendant should convey such portion to the Plaintiff. *CHATTOCK v. MULLER* - - - 177

2. — Contract—Rescission Clause—Absence of Title in Vendor.] A condition in a contract for sale that, if the purchaser shall make any objection or requisition which the vendor shall be unwilling on the ground of expense or otherwise to comply with, the vendor may annul the sale, does not enable a vendor to rescind the contract in a case where he fails to shew any title whatever. *BOWMAN v. HYLAND* - - - 588

3. — Contract—"Subject to the Title being approved by our Solicitors"—Waiver—Abandonment.] The Defendant made an offer by letter to sell an estate to the Plaintiff, which offer the Plaintiff accepted by letter, "subject to the title being approved by my solicitor." After this the Plaintiff wrote to say that he must abandon the purchase unless he was allowed to pay the money by instalments. The Defendant assented to payment by instalments. Shortly afterwards the Plaintiff's solicitor brought to the Defendant's solicitor a paper embodying the terms as to payment, and headed, "Proposal by T. H. for purchase of the M. Estate." The Defendant's solicitor verbally agreed to these terms, and arranged to instruct his counsel to prepare an agreement on the basis of them, but no such contract was prepared. The Defendant having afterwards declined to complete, the Plaintiff brought his action for specific performance, and the Defendant demurred to the statement of claim. On the argument in the Court below, it was taken for granted that the two letters made a binding contract:—*Held*, by *Malins, V.C.*, that the negotiations as to payment by instalments did not amount to an abandonment by the Plaintiff of the original contract, and that the demurrer must be overruled.—*Held*, on appeal, that the words "subject to the title being approved by my solicitor" were not merely an expression of what would be implied by law, but constituted a new term; that the Plaintiff's letter, therefore, was not an acceptance, but a new offer which had never been accepted, and that there was no binding contract.—*A.* wrote to *B.* offering to sell him an estate for £37,500, or a part of the estate for a less sum, and added a postscript reserving the right to remove the materials of a house. *B.* replied: "I beg to acknowledge the receipt of your letter stating that you are willing to accept £37,500 for the whole of your freehold land at *N.* I hereby accept your terms as above, and agree to pay you the said sum of £37,500 for your land":—*Held*, by *Jessel, M.R.*, that this was an acceptance of the terms in *A.*'s letters, including the postscript. *HUSSEY v. HORNE-PAYNE*

[C. A. 670

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VOLUNTARY SETTLEMENT—Agreement by Infant to settle—Ratification—Postnuptial Settlement in pursuance of Antenuptial Agreement by Infant—Statute of Frauds—Lord Tenterden's Act.] In 1857 an infant engaged to be married, wrote to his intended wife, promising that on coming of age he would give her seven specified houses. The marriage took place in 1859, after he came of age. In 1872 he executed a deed, not referring to any previous agreement, by which he conveyed the above and two other houses to trustees upon trust for his wife for life, for her separate use, and after her death upon trust for himself for life, and after the death of the survivor, upon such trusts as the wife should by deed or will appoint, and in default of appointment, in trust for her in fee. He subsequently agreed to sell three of the houses, and the purchaser sued for specific performance:—*Held*, by the Court of Appeal (reversing the decision of *Hall, V.C.*), that the purchaser was entitled to specific performance, for that as the settlement did not refer to any previous agreement, dealt with other property than that mentioned in the letter of 1857, and settled the property in a different way, there was no ratification in writing of the promise contained in that letter, and the settlement therefore was voluntary, and void as against a purchaser for value. *TROWELL v. SHEENTON*

[C. A. 318

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WAIVER—Mortgage—Right to call in principal - - - 201
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WASTE—Lessee—Mine—Slate Quarry opened by the Lessor—Acquiescence—Intermediate Assignee of Term.] To enable a termor to work mines it must be shewn that the reversioner had commenced the working of the mines with a view to making a profit; and there is no difference in this respect between a mine and a quarry.—In 1802 the owner of land demised it to a mortgagee for 500 years at a peppercorn rent. In 1811 the mortgagor granted a lease for twenty-one years to a third party of the mines and quarries under the land. Before that date a slate quarry had been opened and worked by the mortgagor on the property; and after that date, but at what time was uncertain, a second quarry was opened and was worked till the commencement of the suit. In 1820 the mortgagee foreclosed the equity of redemption in the term of 500 years, and took possession of the property. In 1873 the Plaintiff, the reversioner on the term of 500 years, filed a bill to restrain the termor from working the slate quarries during the term, and for an account of profits:—*Held*, by *Hall, V.C.*, and by the Court of Appeal, that if the quarries had been opened by the termor without the authority of the reversioner, the Plaintiff would have been entitled to the relief prayed, notwithstanding the lapse of time:—But *Held*, by the Court of Appeal (re-

WASTE—*continued.*

versing the decision of the Vice-Chancellor), that the result of the evidence was that both the quarries had been opened by the authority of the reversioner, and that the termor was, therefore, entitled to continue to work them for the remainder of the term.—An intermediate assignee of the term, who had not worked the quarries himself, but had received royalties under sub-leases granted before he came into possession, and had parted with his interest before the commencement of the suit, was *held* not to be liable to account either for the profits made, or for the royalties paid to him during his possession of the term. *ELIAS v. GRIFFITH* - C. A. 521

WAY—*Landlord and Tenant—Right of Way, Restricted or General—Obstruction—Injunction.* Defendant, the owner of a house with a gateway and a paved road under, it leading to a paved yard, and a vacant piece of ground at the rear, agreed to grant to the Plaintiff a lease of the house and vacant ground and the appurtenances, with power to erect on the vacant ground a workshop for the purposes of his business as a gas engineer, and it was stipulated, that the Plaintiff should not obstruct the gateway, except for the purposes of ingress and egress. The workshop was erected, and the only access to it by vehicles was through the gateway and over the yard which were also the only approach to the stables of the Defendant, who carried on business in adjoining premises. The Defendant's vans, before the agreement was entered into, had often stood in the yard when not in use. The Plaintiff now alleged that the Defendant blocked up the gateway and yard with his vans, and prevented the access of carts and vehicles to his workshop:—*Held*, that, under the agreement, the Plaintiff had an implied right of way through the gateway and over the yard for the reasonable purposes of his business; that such right was general and not restricted; and that he was entitled to an injunction to restrain the Defendant's obstruction. *CANNON v. VILLARS* - - - 415

WHARFINGER—*Lien* - - - 372
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WILFUL DEFAULT—*Mortgagee in possession*
See MORTGAGE. 4. [424]

WILL—*Construction—Equitable Estate commensurate with Legal Interest—Fee Simple subject to happening of Event.* A testator devised certain freehold property to trustees, their executors and assigns, in trust as, to three freehold houses for the sole benefit of his two daughters *E.* and *S.*, either to live in or let for their joint benefit, and should either of his daughters die and leave no children or child, then either one of the houses, at the option of the survivor, to be sold, and the produce divided between the survivor and such of the testator's sons as should be living, but if either of his daughters should marry and have a child or children, then such child or children to have the mother's share of the rents and profits of the three houses after the mother's decease. On the death of one daughter without children one of the houses was sold, according to the direction in the will. The other daughter then died without

WILL—*continued.*

children:—*Held*, that the gift for the sole benefit of the two daughters of the testator gave them an estate commensurate with the estate in fee given to the trustees, and made them joint tenants in fee subject to executory gifts over in the event of their dying leaving issue; and that, this event not having happened, the joint tenancy in fee was unaffected, and the devise of the survivor was entitled to the two unsold houses. *YARROW v. KNIGHTLY* - - - C. A. 736

2. — *Construction—Gift, Original or Substitutional—Issue of Child dead before Date of Will.* A testator gave his residuary estate to his wife for life, and after her decease to such of the children of his two late sisters as should survive his said wife and should attain twenty-one or marry, in equal shares; but in case any of such children should be dead at his (the testator's) decease, then he directed that such issue should take the share of their deceased parent:—*Held* (affirming the decision of *Bacon, V.C.*), that the gift to the issue of deceased children was a substitutionary gift, and that the issue of a child who was dead at the date of the will could take nothing. *WEST v. ORR* - - - C. A. 60

3. — *Construction—Gift to Wife absolutely, with Power of Disposition for Benefit of Family—Precatory Trust—"Full Confidence"—"Family."* A testator gave all his property to his wife "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so":—*Held*, that the wife took absolutely.—*Lambe v. Eames* (Law Rep. 6 Ch. 597) followed.—A testamentary gift by a married man to his "family" should be read as a gift to his "children" to the exclusion of his wife. *In re HUTCHINSON AND TENANT* - - - 540

4. — *Construction—Misdescription—Words "at or within"—Devise of all Testator's Lands "situate at or within D."—Contiguous Land not within D.—Devise of all Testator's Lands "situate at G. in the Occupation of S."—Land at G. in the Occupation of J.—Falsa Demonstratio—Argument ab inconvenienti.* A testator devised all his lands "situated at or within D., in the occupation of J." The testator was seised of two farms, both in the occupation of J. The greater part of each of the farms was within the parish of D., but three closes of one and one close of the other were respectively situate in an adjoining parish. In each case the portion which was not in the parish of D. immediately adjoined the remainder of the farm, and was only separated from it by the parish boundary, which was, in the one case, a highroad, and in the other, a fence. In the latter case the parish church of D. was only a few yards distant from the fence:—*Held*, reversing the decision of *Fry, J.*, that the devise comprised the four closes adjoining the parish of D.—The testator also devised all his land "situate at G., in the occupation of S.":—*Held* (affirming the decision of *Fry, J.*), that this devise did not include land situate at G., but in the occupation of J.—*Observations on the use of the argument ab inconvenienti in the construction of wills.* *HOMER v. HOMER* - - - C. A. 758

WILL—continued.

5. — *Construction—Residuary Gift—Gift of “Moneys that may be left after my Decease.”* A testator by his will directed his trustees and executors to pay his debts and funeral and testamentary expenses out of his personal estate, and if that should be insufficient, he charged them on his real estate; and he bequeathed all the rest and residue of his personal estate to his daughters. By a codicil, after making alterations in the dispositions of his real estate, he proceeded: “As to all moneys that may be left after my decease, I give and bequeath the same” upon the trusts therein mentioned:—*Held*, by *Hall, V.C.*, that the gift in the codicil was a residuary bequest of the personal estate revoking the residuary gift in the will.—*Held*, on appeal, that the gift in the codicil was only a gift of the money which was in the testator's hands at his death; and that, subject to this exception, the residuary gift in the will remained in force. *WILLIAMS v. WILLIAMS*

[C. A. 789]

6. — *Construction—Residuary Gift—“Sheep and all the Rest, Residue, and other Effects”—Freehold Estate included.* A testator gave two legacies, and then gave his sheep and all the rest, residue, moneys, chattels, and all other his effects, to be equally divided among his four brothers, whom he appointed his executors:—*Held*, that all the freehold as well as personal estate of the testator passed under these words. *SMYTH v. SMYTH* - - - 561

7. — *Construction—Revocation—Devise of Land—Bequest of Money to same Uses—Revocation of Devise—No implied: Revocation of Bequest.* A testator devised freeholds in *Dorsetshire* upon certain trusts, and bequeathed £3000 to his trustees to purchase lands in *Dorsetshire* to be held upon the same trusts. By a codicil he revoked the devise of his freeholds, and declared other trusts without alluding to the £3000:—*Held*, that there was no implied revocation of the bequest of £3000, which would pass under the will as if no codicil had been made. *BRIDGES v. STRACHAN* - - - 558

8. — *Conversion—Enjoyment in Specie—Life Estate interposed by Codicil—Ademption—Gift of Life Interest in Life Policy—Keeping up Premiums—Bonus—Legacy, Specific or Demonstrative—Legacy, Specific or Residuary—Enumeration of Articles.* A testator being possessed, among other things, of Egyptian Nine per Cent. Bonds, and also of a leasehold house held for lives and a policy for £3000 on one of the lives, gave several specific legacies, and, among others, specific legacies of several of his Egyptian Bonds to various legacies, and gave the leasehold house and the policy for £3000, and all bonuses and additions thereto, to *J. M.*, she paying the future premiums, and directed that if she should be married at his death, the house and policy should be settled on her and her children; and the testator gave the residue of his estate, including his household furniture, to *A. L.* After the date of his will the testator married, and by a codicil gave to his wife for her life all the income, dividends, and annual proceeds of his entire estate, and postponed the payment of all legacies and the distribution of all estates vested in him till

WILL—continued.

after her death, and subject thereto confirmed his will.—Between the dates of his will and of his codicil the testator sold his Egyptian Nine per Cent. Bonds, and with the proceeds of the sale and other moneys purchased other Egyptian Bonds called Khedive Bonds.—The holder of the £3000 policy was entitled to a participation in the profits of the office, and had the option of taking the bonuses when declared either by reduction of the premiums or augmentation of the capital insured:—*Held*, that the specific legacies of the Egyptian Bonds were adeemed, and that the Khedive Bonds formed part of the residue:—That the household furniture was not specifically given, but formed part of the residue:—That the bonuses declared by the insurance company must be added to the capital, and not taken in reduction of the premiums:—That the premiums were not payable out of the rents of the leasehold house, but must be raised as they became payable by mortgage of the policy.—*Held*, also (*dissentiente Baggallay, L.J.*), that the residuary estate must be converted according to the rule in *Howe v. Earl of Dartmouth* (7 Ves. 137), and the income paid to the wife during her life:—A legacy of “500 Egyptian Nine per Cent. Bonds” held not to be specific, though the testator had such bonds at the time.—The decision of *Hall, V.C.*, varied. *MACDONALD v. IRVINE* - - - C. A. 101

9. — *Secret Trust—Charitable Purposes—Tenants in Common.* A testatrix devised real estate to two persons, their heirs and assigns, as tenants in common, for their personal use and benefit, without any restriction, trust, or condition whatever. One of the devisees was a mere acquaintance of the testatrix, and the other was her solicitor, who prepared her will and to whom she expressed her intention of leaving her property to charitable purposes. The solicitor informed her that such a devise would not be legal, and this absolute gift was then executed. No undertaking, express or implied, was given by the devisees to accept a charitable trust, though the testatrix probably expected that the devisees would apply the property to some good and useful, but not necessarily charitable, purpose:—*Held*, that whatever might have been the wish or expectation of the testatrix, the devisees were not bound by any secret trust to carry out such intention, but were free to dispose of the property as they pleased; and an action claiming to have the devise declared void was dismissed.—One of the devisees had no intimation during the life of the testatrix that she had devised property to him:—*Held*, that the gift to him, as one of two tenants in common, would not have been void even if a secret charitable trust had been proved with regard to the other devisee, though it would have been so in the case of joint tenants. *ROWBOTHAM v. DUNNETT* - - - 430

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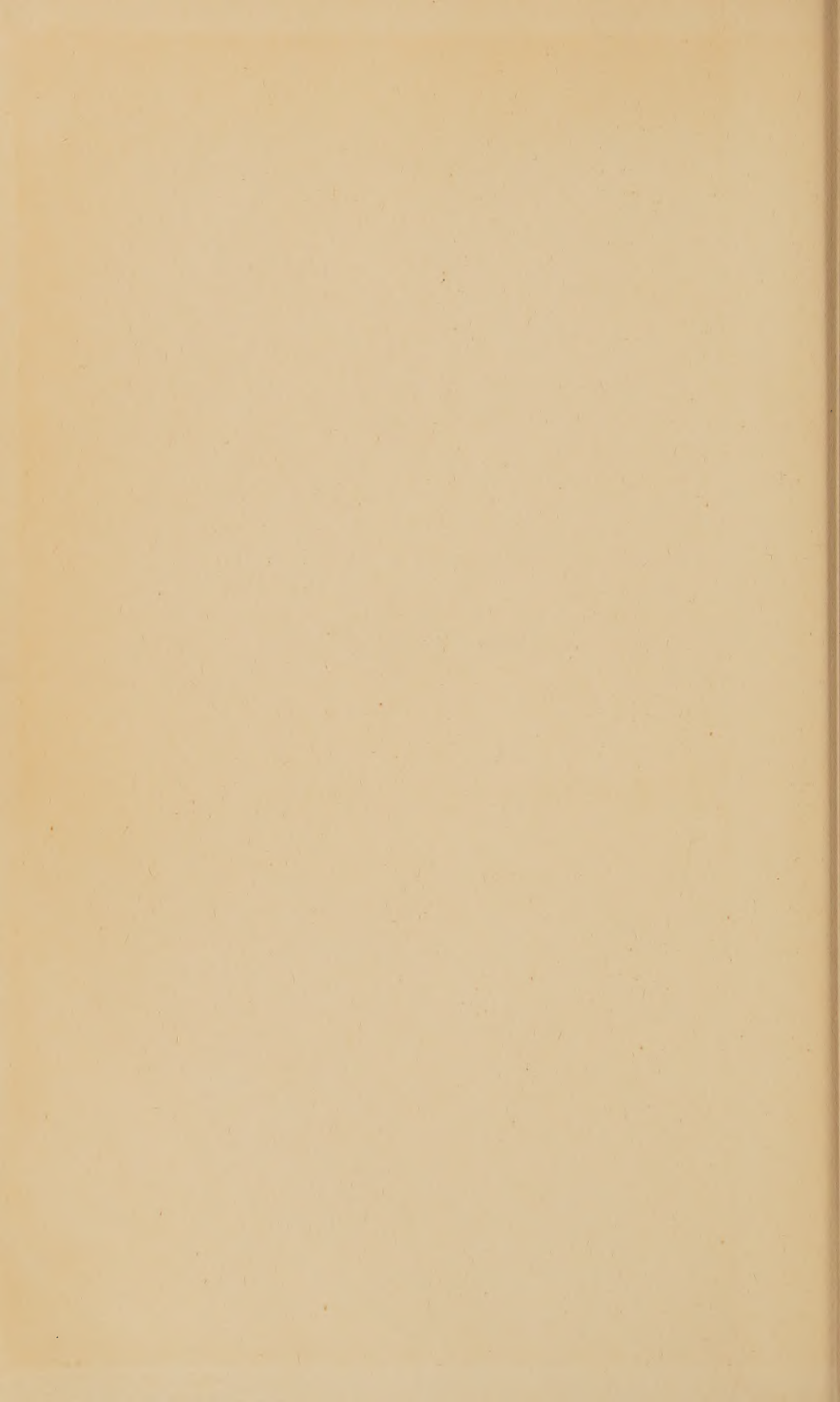
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